THE SECRETARY OF THE INTERIOR

WASHINGTON

NOV 3 1994

Honorable Richard H. Lehman
House of Representatives
Washington, D.C. 20515

Dear Mr. Lehman:

Thank you for your letter of May 24, 1994, cosigned by Representatives Calvin Dooley and Gary A. Condit, regarding implementation of the Central Valley Project Improvement Act (CVPIA).

As discussed in your letter, the dedication of 800,000 acre-feet of Central Valley Project yield for fish and wildlife raises many issues regarding other purposes of the Act, including meeting the Bay/Delta water quality needs; satisfying requirements of the Endangered Species Act for winter-run chinook salmon and delta smelt; and delivery of water for agricultural uses. The primary use of the 800,000 acre-feet will be to double the anadromous fishery in Central Valley streams. Meeting these purposes is a significant challenge and one we do not take lightly. The Fish and Wildlife Service and Bureau of Reclamation have been involved in extensive coordination to establish an approach to meet these purposes to which both agencies are committed.

I recognize that this very significant Act can provide fertile ground for debate on meaning and intent. However, I believe we can all agree that the significant questions do not necessarily rest with exact calculations in acre-feet, but with achieving the primary purposes of the CVPIA. Please be assured that the Department of the Interior is committed to achieving the goals of the Act in an expeditious manner. I anticipate having guidelines on use of water and implementation of other priority actions in the near future. Your input and support is critical to all of us in this endeavor.

I am committed to establishing the foundation for decades to come that will result in productive fish and wildlife resources living in harmony with agricultural and urban interests in California.

If I can be of further assistance, please do not hesitate to call.

Sincerely,

A HISTORY OF WATERSHED PROTECTION

THE SACRAMENTO VALLEY OF CALIFORNIA

California RICE Industry Association

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WATERSHED PROTECTION:
FEDERAL ACTIVITIES AND LAWS

SELECTED EVIDENCE OF FEDERAL INTENT THAT THE CENTRAL VALLEY PROJECT BE SUBJECT TO STATE LAW

1. "The Act of March 3, 1891...leave(s) the disposition of the water to the state." -

> "The 1891 Act relegated the matter of appropriation and control of all natural sources of water supply in the State of California to the authority of that state. The Act of March 3, 1891, deals only with the right-of-way over the public lands to be used for the purposes of irrigation, leaving the disposition of the water to the state." H.H. Sinclair, 18 ID 573, 574 (1894).

2. "The United States does not control the water. It controls only the reservoir sites..."

> The United States does not control the water. It controls only the reservoir sites in which the water may be collected. The water is under the control of the states." 29 Cong. Rec. 1948-1949 (1897) (Cong. Lacey).

3. "The distribution of the water...should be left to the settlers..."

> "The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with state laws and without interference with those laws or with vested rights." Theodore Roosevelt, HR Doc. No. 1, 57th. Cong., 1st. Sess., XXVIII (1901).

"Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state..."

> "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the secretary of the interior, in carrying out the provisions of this act, shall proceed in

conformity with such laws, and nothing herein shall in any way affect any right of any state or of the federal government or of any land owner, appropriator, or user of water, to, or from an interstate stream or the waters thereof: Provided that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." Reclamation Act of 1902 (43 USCS §§ 371m 383.)

4. "...even an appropriation of water can not be made except under state law."

"The bill (the Reclamation Act of 1902) provides explicitly that even an appropriation of water can not be made except under state law." 35 Cong. Rec. 6687 (1902) (Cong. Mondell).

5. "If the appropriation and use were not under the provisions of the state law the utmost confusion would prevail."

"If the appropriation and use were not under the provisions of the state law the utmost confusion would prevail." 35 Cong. Rec. 6770 (1902) (Cong. Sutherland).

6. "...the authority of each state in the disposal of the water...was unquestioned and supreme..."

"It has heretofore been assumed that the authority of each state in the disposal of the water supply within its borders was unquestioned and supreme,..." E. Mead, Irrigation Institutions 372 (1903). -

"...the Bureau of Reclamation fully recognizes and respects existing water rights..."

"...the Bureau...has complied with California's 'County of Origin' legislation...only surplus water will be exported elsewhere."

"In conducting irrigation investigations and constructing and operating projects throughout the west, the Bureau of Reclamation fully recognizes and respects existing water rights established under state law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure. This basin report on the Central Valley is predicated on such a policy." "Comprehensive Departmental Report on the Development of the Water and Related Resources of the Central Valley Basin" (August, 1949, Sen. Doc. 113, 81st Con., 1st Sess.)

The report went on to state:

"In addition to respecting all existing water rights, the Bureau of this report has complied with California's 'County of Origin' legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus water will be exported elsewhere." "Comprehensive Department Report on the Development of the Water and Related Resources of the Central Valley Basin" (August, 1949, Sen. Doc. 113, 81st Con., 1st Sess.)

7. "Since it is clear that the states have control of water within their boundaries...the California Constitution...protects the vested rights of...owners for present and prospective beneficial uses to which the lands are or may be adaptable..."

"Since it is clear that the states have control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the state, if there is to be proper administration of the water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st. Sess., 3, 6 (1951).

"Sections 11460, 11463 and 10505 are in keeping with the provisions and the policy of (the California Constitution) which permits and requires reasonable and beneficial use, and which protects the vested rights of the riparian and overlying owners for present and prospective beneficial uses

to which the lands are or may be adaptable; and they extend by statute the protection given to riparian and overlying owners by the (California Constitution) to all inhabitants and property owners of the County in water which may be necessary for the development of the County and which protection they only incidentally and indirectly received prior to (the adoption of Article X, § 2 of the California Constitution)." Rank v. Krug (1956) 142 F. Supp. 1, 150.

8. "...the Attorney General handed down an opinion which held...that the provisions of Sections 11460 and 11463 are imposed upon any agency of the State of California or United States..."

"In Opinion 53/298 filed January 6, 1955 (25 Ops. Cal. Atty. Gen. 8), the Attorney General (Pat Brown) handed down an opinion which held among other things, that the provisions of Sections 11460 and 11463 are imposed upon any agency of the State of California or United States by virtue of the statute, regardless of their inclusion or omission in any permit issues by the State Engineer. In that conclusion, the Court agrees." Rank v. Krug (1956) 142 F. Supp. 1, 150.

9. "The assignments by the Department of Finance to the United States were thus ineffectual to transfer anything except the right to pursue the applications to permit, under the terms and conditions of the California Water Code."

"The assignments by the Department of Finance to the United States were thus ineffectual to transfer anything except the right to pursue the applications to permit, under the terms and conditions of the California Water Code." Rank v. Krug (1956) 142 F. Supp. 1, 153.

10. "Project plans must comply with state legal provisions or priorities for beneficial use of water."

> "State and federal law and policy established the framework for project formulation. Project plans must comply with state legal provisions or priorities for beneficial use of water." United States Department of Interior, Bureau of Reclamation, Reclamation Instructions Section 116.3.1 (1959).

WATERSHED PROTECTION:
STATE OF CALIFORNIA ACTIVITIES AND LAWS

SELECTED EVIDENCE OF STATE INTENT TO PROTECT COUNTIES/WATERSHEDS OF ORIGIN

1. "...diversion of surplus waters from the Sacramento River into the San Joaquin Valley... gives full protection against present or future loss..."

   "In fact, the whole discussion of the diversion of surplus waters from the Sacramento River into the San Joaquin Valley, must be predicated from the institution of a coordinated development in both valleys that gives full protection against present or future loss to the owners of vested rights into present users of water as well as to those potential users whose lands lie tributary to streams from which exportations of water are proposed." Bull. No. 9, Div. of Engineering and Irrigation, Dept. of Public Works (1925) p. 18.

2. "...new supplies...would be taken from areas of surplus after providing for their completed development."

   "The new supplies for the deficient areas would be taken from areas of surplus after providing for their complete development." Bull. No. 12, Div. of Engineering and Irrigation, Dept. of Public Works (1925) p. 48.

3. "...no water should be diverted from the area of origin which is now or may ever be required for any beneficial use..."

   "In supplying areas of deficiency of water from areas of surplus, only such water as is not needed to serve vested or other property rights, or necessary for supplying the uses and purposes hereinbefore mentioned should be considered and no water should be diverted from the area or origin which is now or may ever be required for any beneficial use within such area of origin." Report of Joint Legislative Committee Dealing With the Water Problems of the State, January 18, 1929, p. 19.

4. "It shall be the policy of the state to extend to the areas of surplus water...definite and valid assurance that such areas...shall have a right to ample water for their ultimate needs..."

> "It shall be the policy of the state to extend to the areas of surplus water, from which, under the coordination policy or development thereof, areas of deficient water may obtain a supply, definite and valid assurance that such areas of surplus from which water is or may be taken shall have a right to ample water for their ultimate needs, superior and prior to that of the areas of deficiency to make use of such surplus." Supp. Report of Joint Legislative Committee Dealing With the Water Problems of the State, April 9, 1929, p. 5.

5. "...basins favored with water in excess of their needs would be furnished a regulated supply in accordance with the requirements of their ultimate development."

> "Under this plan, the basins favored with water in excess of their needs would be furnished a regulated supply in accordance with the requirements of their ultimate development. Waters in excess of their needs would be conveyed to areas of deficiency..." Bull. No. 25, Div. of Water Resources, Dept. of Public Works, January 1, 1931, p. 35.

6. "No priority under this part...shall...deprive the county in which the appropriated water originate of any such water necessary for the development of the county."

> "No priority under this part (Part 2, Appropriation of Water by Dept. of Finance) shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originate of any such water necessary for the development of the county." Water Code § 10505 (stats. 1931, Ch. 720, p. 1514.)

7. "...a watershed or area wherein water originates ...shall not be deprived...of the water reasonably required to adequately supply the beneficial needs of the watershed..."

> "In the construction and operation by any authority of any project under the provisions of this part (Part 3, Central Valley Project), a watershed or area which water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein." Water Code § 11460 (stats. 1933, Ch. 1042, p. 2650, § 11.)

8. "Section 11460 has the effect of reserving to the entire body of inhabitants and property owners in watersheds of origin a priority..."

> "Section 11460 has the effect of reserving to the entire body of inhabitants and property owners in watersheds of origin a priority as against the water project authority in establishing their own water rights in the usual manner as their needs increase from time-to-time up to the maximum of either their ultimate needs or the yield of the particular watershed." 25 Ops. Cal. Atty. Gen. 8, 20 (1955).

9. "The priority...of watersheds...may not in any way be defeated..."

> "The priority thus reserved to inhabitants of watersheds of origin by section 11460 may not in any way be defeated by any action or proceeding by the authority." 25 Ops. Cal. Atty. Gen. 8, 22 (1955).

10. "...it should be noted that the statute imposes the limitations in any event..."

> "Therefore as to either state or federal agencies engaged in construction and operation of the Central Valley Project, the state engineer may incorporate into his permit as conditions thereof the limitations on the powers of assignees established by sections 11460 and 11463. However, it should be noted that the statute imposes the limitations in any event, regardless of their inclusion or omission from the permit." 25 Ops. Cal. Atty. Gen. 8, 32 (1955).

NCWA
Northern California Water Association

November 16, 1994

Mr. Patrick Wright
Bay/Delta Program Manager
U.S. Environmental Protection Agency
Water Management Division (W-3)
75 Hawthorne Street
San Francisco, California 94105

Dear Mr. ~~Wright~~ Patrick:

I am writing on behalf of the members of the Northern California Water Association (NCWA) regarding our views on the Federal Club-Fed process. This process includes efforts to establish water quality standards for the Sacramento/San Joaquin Delta and San Francisco Bay (Bay/Delta), to impose Endangered Species Act restrictions and to implement provisions of the Central Valley Project Improvement Act. We also would like to share our views with respect to State efforts to address these issues.

NCWA supports State and Federal efforts to protect the valuable natural resources of the Central Valley and the Bay/Delta. We believe, however, that environmental protections must be balanced with the real social and economic consequences that often arise as a result of these efforts. We also believe water quality standards and regulations for the Bay/Delta that are ultimately adopted must be implemented in a strict adherence with California law, including the water rights priority system and area-of-origin statutes.

In attempting to understand the magnitude of the Club-Fed process and possible State action, we have requested the general counsel of the Glenn-Colusa Irrigation District, an NCWA member, to provide his analysis on these issues. I have enclosed this analysis for your review. The enclosed letter serves as an initial explanation that clearly articulates NCWA's position and outlines an approach as to how we can proceed together, from this point forward, to properly address these serious issues. We will, in the next few weeks, supplement this document with additional materials that further discuss the NCWA position.

Please call me if you would like any additional information regarding our views in this matter.

Sincerely,

Richard Golb

Richard Golb
Executive Director

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EXECUTIVE SUMMARY

Currently, various federal actions are being developed which could have a significant and adverse effect upon Northern California water rights.[1] The actions emanate from the so-called "Club Fed" process which combines the authority of the Environmental Protection Agency ("EPA") in the context of the formulation of Clean Water Act ("CWA") standards for the Bay-Delta, with the United States Fish and Wildlife Service's ("USFWS") and National Marine Fisheries Service's ("NMFS") authority pursuant to the Endangered Species Act ("ESA") and the United States Bureau of Reclamation's ("USBR") obligations associated with the Central Valley Project Improvement Act ("CVPIA").

The Club Fed process is designed to control the short- and long-term future of California water. The Club Fed process not only seeks to establish the specific Bay-Delta water quality standards to be adopted, but also how those standards will be implemented. By combining the collective authority and operational control of EPA, USFWS-NMFS and the USBR, Club Fed can, by coercion, force the State of California to comply with the federal mandate.

At this point, the Club Fed process does not balance its proposed standards and regulations with the potential harm it is certain to cause to vital social and economic interests within California. It masks the actual impacts of any one federal action with a faulty analysis which assumes that other regulatory actions

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1 While couched in terms of Northern California water rights, the same, in essence, is true with respect to any upstream area within California where senior water rights exist and where so-called area-of-origin protections apply.

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are in place, despite the fact that they are not. As a consequence, no true baseline is established upon which to evaluate the cumulative impacts of the entire Club Fed process.

Additionally, the Club Fed process further masks the potential economic and social impacts of its proposed standards and regulations by ignoring the property based prior appropriation system of California law. Instead, Club Fed endorses a "share-the-pain" concept for implementation of its regulations and standards. This concept assumes an "equitable" allocation of responsibility to meet Bay-Delta standards ignoring property rights, including water rights priorities and area-of-origin entitlements.

In addition to violating the Fifth and Fourteenth Amendments to the United States Constitution, ignoring the California water rights system destabilizes the very certainty this system of law was designed to create. The economic and social instability that would result from the dismantling of the water rights system would first be felt in the collapse of water marketing efforts within California which are based upon certainty in underlying water rights. The consequences would next be felt throughout the financial sector by a lack of financing for water and related projects which are dependent upon a degree of certainty in water supply.

The coercive pressure associated with the Club Fed process has, of course, already been felt among export water users. As a result, those water users have

developed a joint approach for dealing with the Club Fed mandates. This approach could be endorsed with two qualifications.

First, it, as well as the Club Fed proposal, should be scrutinized pursuant to a proper economic analysis. This analysis may lead to an adjustment of the proposal to account for a reasonable balance of interests. The acceptance and application of standards without a proper balancing is simply unacceptable.

Second, the economic analysis must contemplate implementation through the property-based prior rights system of California water law. Thus, the disproportionate economic impacts discussed above must be recognized, evaluated and balanced as part of the standard-setting process. The prior right system of law should be utilized to reallocate, through water transfers, water from where uses may be modified to those export areas which otherwise would be water short.

Finally, in this regard, the priority guarantees found within the area-of-origin laws must be honored. As a consequence, the burden associated with the Club Fed process should not be borne by entities and individuals within the areas of origin.

The issues outlined here are obviously of great concern. They are also hard to fully comprehend in light of the interrelationship of state and federal law and the various federal agencies involved. The danger is that in responding to any one aspect of the problem, there is a great danger that unintended harm will

result. As a consequence, the specific issues raised here must be dealt with as part of a greater policy directive. These directives include the following:

- Implementation of regulatory provisions associated with the CWA, ESA and CVPIA must be undertaken in a manner that minimizes the loss of jobs and minimizes adverse impacts to the economy.

- Implementation of regulatory provisions associated with the CWA, ESA and CVPIA must be undertaken in a reasonable and balanced fashion. Prior to imposing regulations in the Bay-Delta, there must be analysis of current obligations due to state and federal regulations in upstream areas. In this way, the total impact of regulations can be evaluated.

- "Share the pain" cannot be an Administration policy. Rather, the means by which regulations are imposed should be a matter of state law. Property rights, including water rights priorities and area-of-origin protections, must be honored and adhered to. The impact of regulations on any group of water users must be part of the analysis undertaken in developing federal regulations and standards. These regulations and standards may need to be modified if they have an unreasonable impact on any group of water users. Water transfers, facilitated by federal agencies, may be one means by which regulatory impacts can be minimized.

- Economic analysis of regulations and standards must be undertaken in a way that discloses, rather than masks, economic impacts. The consequence of each action must be evaluated as must the cumulative impacts of all proposed actions together.

- The CVPIA's PEIS's no-action alternative must use as a basis the operation of the CVP in October, 1992. All proposed alternatives should be evaluated against this baseline.

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November 15, 1994

Mr. Richard K. Golb
Executive Director
Northern California Water Association
1121 L Street, Suite 904
Sacramento, CA 95814

Re: Northern California Water Rights

Dear Mr. Golb:

You have asked me, as General Counsel for the Glenn-Colusa Irrigation District ("GCID"), a member of the Northern California Water Association ("NCWA"), to provide my views with respect to the current Bay-Delta process, the so-called " Club Fed" process and the Bureau of Reclamation's ("USBR") implementation actions associated with the Central Valley Project Improvement Act ("CVPIA"). In particular, you have asked me to provide you with my thoughts on how these various actions may affect Northern California water rights.[1] I have spent a great deal of time thinking about this matter and offer the following as a means to both share my views with you and to facilitate further discussion.[2]

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1 While the question addressed here focuses on Northern California water rights, the same analysis, in essence, would apply to any upstream area within California where senior water rights exist and where the so-called area-of-origin protections apply.

2 In order to maximize a broad understanding of the points developed in this letter, I have attempted to minimize detailed legal argument. As a consequence, some of the statements I make about the law are conclusory in nature. I have, however, developed background legal memoranda which support each of these conclusions. These background memoranda are available upon request.

While I attempt below to explain the Bay-Delta, Club Fed and CVPIA process in detail, in a most fundamental way, the issues and problems faced here are not new. They are, in essence, water supply problems stemming from either shortage of supply or problems associated with the location and distribution of water. These problems, in most respects, define the West, including California.

As you know, I teach a course in Natural Resources Law and Public Land Law; and since most of what is dealt with is western in nature, I focus on this physical/cultural fact a great deal. I attempt to remind my students that they must understand the uniqueness of the West in order to understand the law of the West as it addresses natural resources. It is difficult because the mini-culture of California masks the broader western culture which underlies us all. In attempting to establish this point I like to quote from a famous western author, Wallace Stegner.

> "[T]he western landscape is more than topography and landforms, dirt and rock. It is, most fundamentally, climate – climate which expresses itself not only as landforms but as atmosphere, flora, fauna. And here, despite all the local variety, there is a large, abiding simplicity. Not all the West is arid, yet except at its Pacific edge, aridity surrounds and encompasses it. Landscape includes such facts as this. It includes and is shaped by the way continental masses bend ocean current, by the way the prevailing winds blow from the West, by the way mountains are pushed up across them to create well-watered coastal or alpine islands, by the way the mountains catch and store the snowpack that makes settled life possible in the dry lowlands, by the way they literally create the dry lowlands by throwing a long rain shadow eastward . . . .
>
> "Aridity, more than anything else, gives the western landscape its character. It is aridity that gives the air its special dry clarity; aridity that puts brilliance in the light and polishes and enlarges the stars; aridity that leads the grasses to evolve as bunches rather than as turf; aridity that exposes the pigmentation of the raw earth and limits, almost eliminates, the color of chlorophyll; aridity that erodes the earth in cliffs and badlands rather than in softened and vegetated slopes . . . . The West, Walter Webb said, is 'a semi-

desert with a desert heart' . . . . [T]he primary unity of the West is a shortage of water.

"The consequences of aridity multiply by a kind of domino effect. In the attempt to compensate for nature's lacks we have remade whole sections of the western landscape. The modern West is as surely Lake Mead, . . . Lake Powell, [Lake Shasta] and the Fort Peck reservoir, the irrigated greenery of the Salt River Valley and the smog blanket over Phoenix [and Los Angeles], as it is the high Wind River Range or the Wasatch or the Grand Canyon. We have acted upon the western landscape with the force of a geological agent. But aridity still calls the tune, directs our tinkering, prevents the healing of our mistakes; and vast unwatered reaches still emphasize the contract between the desert and the sown."[3]

* * *

"California, which might seem to be an exception, is not. Though from San Francisco northward the coast gets plenty of rain, that rain, like the lesser rains elsewhere in the state, falls not in the growing season but in winter. From April to November it just about can't rain. In spite of the mild coastal climate and an economy greater than that of all but a handful of nations, California fits Walter Webb's definition of the West as 'a semi-desert with a desert heart.' It took only the two-year drought of 1976-77, . . . to bring the whole state to a panting pause. The five-year drought from 1987 to 1991 has brought it to the point of desperation."[4]

It is out of this basic understanding of the West that solutions to the inherent water supply problems outlined above were identified. In this regard, the law formed around the idea that it ought to provide a degree of certainty in what otherwise was an inherently uncertain situation. The law that was formed was the law of prior appropriation.

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3 Stegner, *Where the Bluebird Sings to Lemonade Springs* (1992) at pages 16-17.

4 *Id.*, at page 60.

While there is some dispute as to its actual origin, for the instant discussion, it is sufficient to state that the doctrine of prior appropriation paralleled the establishment of mining laws by those who had flocked to California during the gold rush. Many of the mines established in California during that era were placer mines, and placer mines require water for operation. Two limitations on the availability of water had to be dealt with. First, the mines themselves were not always near the water source, requiring the water to be diverted from the source and conveyed, sometimes over great distances, for use at the mine sites. Second, there was not always enough water to serve the needs of all of the miners who wanted to use it.

The riparian doctrine utilized in the pluvial East did not meet the miners' needs. In the first place, the doctrine had been developed based upon the notion that water was to be used on land appurtenant to the stream from which it was being taken. Additionally, the doctrine had been developed in an area where there was no shortage of water and thus no mechanism for dealing with the allocation of water in the case of shortages.

As a consequence of the inadequacy of eastern riparian law, the miners adopted a legal system for the allocation of water which accommodated their needs. This method of allocating a limited supply of water among numerous miners has been termed the doctrine of prior appropriation. The doctrine, like the mining law from which it originated, has as its center the rule of "first in time, first in right." Additionally, water was limited to the amount originally appropriated and the right to use water could be lost (as could a mining claim) through abandonment.

This method of water allocation proved to be well-suited for life in the arid and semi-arid West. Indeed, it was so successful that it spread from the California mining fields to the rest of the West.

The significance of the doctrine's origin is that it is tied to the economic and social needs within the areas in which it developed. As noted by the California Supreme Court in *Irwin v. Phillips*, 5 Cal. 140 (1855):

> "Courts are bound to take notice of the political and social condition of the country, which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata*. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the Legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law makers; as for instance, in the Revenue Act 'canals and water races' are declared to be property subject to taxation, and this when there was none other in the State than such as were devoted to the use of mining. Section 2 of Article IX of the same Act, providing for the assessment of the property of companies and associations, among others mentions 'dam or dams, canal or canals, or other works for mining purposes.' This simply goes to prove what is the purpose of the argument, that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their

> natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority upon the maxim of equity, *qui prior est in tempore, potior est in jure*. The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal recognition from the sovereign power. If it is upon a stream the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted, and for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection." *Id.* at 146-47.

Although developed through custom and usage, appropriative rights in California are now governed primarily by statute. *See* Wat. Code § 100 *et seq.* The state grants an appropriative right for the use of a specific quantity of water for specific beneficial purposes, if water is available, and if the water is free from claims of others with earlier appropriations. The right is initiated either by actual use, as is the case with pre-1914 appropriative water rights, or by application for a permit or license. The place of use is not limited to riparian lands or even to a particular watershed. The right may be conveyed and it may cease to exist if it is not used.

The single most important element in the appropriative rights system is the doctrine of priority. W. Hutchins, *The California Law of Water Rights*, 130 (1958); 1 W. Hutchins, *Water Rights Laws in the Nineteen Western States*, 396-400 (1971); 1 S. Weil, *supra* note 2, §§ 299-301, at 307-13; 1 C. Kinney, *supra* note 2, §§ 599-603, at 1043-52. The historic rule of "first in time, first in right" has been described as follows:

> "One of the essential elements of a valid appropriation is that of priority over others. Under this doctrine he who is first in time is first in right, and so long as he continues to apply the water to a beneficial use, subsequent appropriators may not deprive him of the rights his appropriation gives him . . . ." *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 26, 276 P. 1017 (1929).

The rule of "first in time, first in right" requires that a senior appropriator have first call on all available water claimed by him, with subsequent junior appropriators being able to make appropriative decisions based on knowledge of their chance to obtain an adequate supply. The right to the use of water in most jurisdictions is predicated upon the use being reasonable. In California, the right extends only to the "reasonable beneficial" use of water. *See, e.g.*, Cal. Const. art. X, § 2. This aspect of the right acts to provide an additional element of certainty in the system, because it not only guarantees the continued ability to use water so long as the use is reasonable and beneficial, but also allows the junior appropriator to limit a senior appropriator's use if the senior's use is wasteful.

In California, in addition to the law of prior appropriation, there exists a body of law commonly referred to as "area-of-origin laws." These laws serve to provide a water right priority to those areas within the State in which water originates. These laws are extensive and include Water Code section 11460, which prohibits the Department of Water Resources from depriving a watershed or area of origin of the "prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed area, or any of the inhabitants or property owners therein" and Water Code sections 10505 and 10505.5 which provide for the reservation of water for counties of origin through so-called "state filings." State filings are applications to appropriate water to benefit local areas and which contain early priority dates. Water Code section 11128 provides that the United States, in the development of the Central Valley Project ("CVP"), shall be bound by the provisions of Water Code sections 11460 and 11463 (dealing with the exchange of water from one watershed to another). I view these statutes collectively as conferring upon areas of origin certain priorities which must be honored prior to the time that water surplus to these areas' needs can be made available to others.

In *California v. United States* (1978) 438 U.S. 645, the United States Supreme Court held that the United States, in the construction and operation of

USBR projects, was bound by state law. This would, of course, include the law of prior appropriation, as well as the area-of-origin provisions of state law. Indeed, federal authorization of the CVP is replete with specific references providing assurance that area-of-origin rights would be protected and, in particular, that only water "surplus" to the needs of the Sacramento Valley would be exported.[5]

In the context of the matters that are at issue here, I recognize that when one speaks of prior water rights, the risk exists that this will be taken as an attack on the environment or on junior water right holders and those who export water through the Delta. That is not the case here.

First, I assume that certain environmental obligations must be dealt with and addressed. The issues dealt with here focus on the question of how they are to be met and whether true analysis of economic and social impacts is to be addressed.

Second, I do not view the situation from a water rights perspective as being adversarial with junior right holders and exporters pitted against senior right holders. Indeed, with certain limitations, I endorse the joint urban-San Joaquin agricultural proposal for the Bay-Delta. I do believe, however, that solutions to the water allocation problems associated with Bay-Delta standards are to be found within the prior rights system and not through the abandonment of that body of law.

It is with this foundation that the current environmental concerns being addressed as part of the Bay-Delta, Club Fed and CVPIA process must be evaluated. There are probably any number of ways to describe this process and the order of explanation may be important. I have here decided to start with the

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5 The California Rice Industry Association has prepared an interesting partial compilation of watershed protection assurances as applied to the Central Valley Project. It also includes reference to various State promises associated with watershed protection. I have included this document for reference as an attachment to this letter.

CVPIA's provision requiring the development of a programmatic environmental impact statement, because I believe that a description of that provision best captures the interrelated nature of the process with which we are faced.

Section 3409 of the Central Valley Project Improvement Act ("CVPIA") provides as follows:

> "Not later than three years after the date of enactment of this title, the Secretary shall prepare and complete a programmatic environmental impact statement pursuant to the National Environmental Policy Act analyzing the direct and indirect impacts and benefits of implementing this title, including all fish, wildlife, and habitat restoration actions and the potential renewal of all existing Central Valley Project water contracts. Such statement shall consider impacts and benefits within the Sacramento, San Joaquin, and Trinity River basins, and the San Francisco Bay/Sacramento-San Joaquin River Delta Estuary. . . ."

The provision requires the preparation of a Programmatic Environmental Impact Statement ("PEIS") to analyze two specified actions: (1) the operation of the Central Valley Project ("CVP"); and (2) the implementation of the CVPIA. This undertaking is ambitious and, as will be discussed below, by necessity includes coordination with and incorporation of standards imposed for the San Francisco Bay and Sacramento-San Joaquin Delta ("Bay-Delta") by the Environmental Protection Agency ("EPA") under the Clean Water Act ("CWA") and requirements imposed by the United States Fish and Wildlife Service ("USFWS") pursuant to the Endangered Species Act ("ESA"). There is little question that the PEIS and the policy decisions made within that document will have significant ramifications throughout California. Section 3409, therefore, not only provides a mechanism to analyze the total impacts of CVP operations, including impacts associated with the implementation of the CVPIA, but, more fundamentally, the PEIS process provides a means to comprehensively, on a broad programmatic basis, develop a long-term operation strategy for the CVP. Because of the sheer size of the CVP, as well as its

coordination with the State Water Project ("SWP"), decisions made with respect to the CVP will have a direct effect on all of California.

Pursuant to the CVPIA, there are crucial activities that cannot be undertaken prior to the completion of the PEIS. The most significant of these limitations is that CVP water contracts can only be renewed for increments of two years (after an initial three-year interim renewal) until the PEIS is completed. The long-term contracts themselves, will, of course, be negotiated and executed based upon the PEIS.

As noted above, the PEIS is to evaluate "the direct and indirect impacts of implementing . . . [the CVPIA], including all fish, wildlife, and habitat restoration actions. . . ." These "actions" include specific activities articulated in section 3406(b) of the CVPIA, including the allocation or reallocation of 800,000 acre feet ("af") of water for fish, wildlife and habitat restoration purposes, to protect waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and to meet legal obligations of the CVP, including obligations under the federal ESA. Indeed, the CVPIA, in essence, incorporates these obligations into its provisions and, thus, the impacts associated with these requirements must be accounted for and analyzed within the PEIS.[6]

For a period of time after CVPIA enactment, there was a great deal of concern that a lack of coordination between and among the United States Bureau of Reclamation ("USBR"), USFWS, the National Marine Fisheries Service ("NMFS") (with respect to ESA requirements associated with the winter-run salmon) and EPA would create a disaster with duplicative and potentially inconsistent standards being established and imposed upon water users. Most of the focus was and still is on the

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6 This interrelationship of the CVPIA and the establishment of Bay-Delta standards and the meeting of ESA obligations was noted recently by Secretary Babbitt in a letter to Congressman Lehman where the Secretary stated that "the dedication of 800,000 acre-feet of Central Valley Project yield for fish and wildlife raises many issues regarding other purposes of the Act [CVPIA], including meeting the Bay/Delta water quality needs; satisfying requirements of the Endangered Species Act for winter run salmon and delta smelt . . . ." See letter from Bruce Babbitt to Richard H. Lehman, dated November 3, 1994. A copy of this letter is attached for your information and convenience.

Bay-Delta. This focus results from EPA's rejection of past efforts by the State of California to develop Bay-Delta water quality standards.

The lack of coordination and the threats posed by it were addressed and relieved through the development of the so-called "Club Fed" process and through the subsequent, although as yet untested, coordination with the State of California in the so-called "Cal-Fed" process.

Coordination, however, through the Club Fed process, while curing one problem, creates other problems which may, in effect, be more significant than the problem Club Fed was developed to avoid. The Club Fed process blurs the lines of authority upon which individual federal actions must be predicated, thus precluding any ability to trace and properly analyze the actions being undertaken by the federal agencies. In particular, adverse impacts associated with any individual action is masked by impacts associated with other actions. The net result is, for example, the type of economic analysis that accompanied the Club Fed 1993-94 draft Bay-Delta standards. This analysis severely understated actual impacts to jobs and the economy. As will be discussed in more detail below, this blurring of authority is incorporated into the PEIS and, as a consequence, the true impacts associated with the CVPIA, ESA, and EPA may not be properly analyzed. One, of course, can only assume that this same improper economic analysis will accompany final Club Fed action later this year.

Additionally, the Club Fed process ignores the State's water rights system. EPA's CWA proposal, for example, does not even consider the limits of state water law. The USFWS's ESA activities similarly fail to recognize state water law limitations. Those agencies, together with USBR, "as a matter of administration policy" advocate a "share the pain" approach to implementation of the federally-developed standards and regulation. "Share the pain" is an implementation scheme concocted by Club Fed and advocated by others which would ignore the relative priority of water rights and, instead, allocate responsibility for Bay-Delta obligations in an "equitable" fashion devised by the regulators, thereby spreading the burden or "pain" of meeting the Bay-Delta obligations among the broadest

possible number of water users. Share the pain ignores property rights in the form of water rights priorities, because, Club Fed argues, to do otherwise "would not be fair."

Proceeding in this manner, however, not only violates the Fifth Amendment and Fourteenth Amendment protections, but also again serves to underestimate the actual economic and social impact of what is proposed. As noted, the PEIS, at least at one time, adhered to this flawed approach.[7]

While one can argue strenuously about the relative merits of the substantive provisions of the CWA, ESA and CVPIA, the issue posed here is much simpler and narrower. Assuming that the above authority exists and is appropriate, Club Fed must proceed in a manner that is the most sensitive and least destructive to the social and economic fabric of California, including sensitivity to the agricultural sector and jobs. This cannot be done unless the true impacts of Club Fed actions are analyzed rather than masked, and water rights are honored and accounted for in implementation analyses.

In proceeding, Club Fed does not start with a clean slate. Its actions are circumscribed by the laws under which it acts. Not one federal statute at issue, whether it be the CWA, ESA or CVPIA, sanctions unreasonable behavior. Not one of these statutes compels actions in an inflexible manner without some deference to economic and social consequences. Club Fed, however, articulates a philosophy which attempts to shield its actions from criticism by asserting that the actions are compelled by inflexible statutory provisions. Club Fed cannot hide behind this position. It must be able to justify its actions on the merits.

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7 I have been told that within the so-called "Cal-Fed" framework the Club Fed agencies have indicated that they will follow the SWRCB water rights process. This appears to contradict their statements to me and to others. It also ignores their actions. It could be, however, that the Club Fed agencies intend, within the SWRCB process, to argue that the prior rights system of allocating responsibility for standards and regulations should be abandoned in favor of "share the pain." At least one Club Fed agency head has indicated that this would be the case. In my view, regardless of how they justify ignoring state law, the result will be the same.

Additionally, and related to the limits of Club Fed actions, Club Fed must also be constrained by the property rights which govern the allocation of water. The EPA and USFWS, as regulators, and the USBR, as a "junior" water rights holder, may not ignore these fundamental rights. They are essential to the economic and social vitality of California and the West.

As discussed in detail above, these issues are not unique or new. In the purest sense, the current situation poses the same problem that existed at statehood – we live in an arid or semi-arid climate and there is too little water to meet the demand. The places where the water exists and the time in which it is available do not correspond with the locations and times where and when we would like to consume the water. The diversion and consumption of water (regardless of climate) from its source is bound to have an environmental consequence. In the arid and semi-arid West this consequence is likely to be significant and adverse. The construction and operation of dams, of course, compound these problems.

Assuming the foregoing is as obvious as it appears, it should also be obvious that modification of existing diversion and consumptive use patterns in order to address environmental concerns will have adverse economic and social impacts. Unfortunately, the further from California one is, there is apparently less concern about these economic and social impacts. As a consequence, federal agencies have, for the most part, been least sensitive to and less honest about the economic and social consequences of environmental protection.

Finally, in this regard, as cities and urban water demand have grown, there has been created a growing tension over the ownership of water rights. As discussed above, water rights have always been considered real property rights. These real property rights have been owned primarily by agricultural interests who were "first in time" in California. The growing tendency has been an attempt to ignore the property nature of the water right in order to facilitate reallocation. Again, perhaps because of distance, this tendency has been most prevalent at the federal level where

state water law has been seen as an obstacle to reforms wanted by federal agencies. The fear is that the State will either willingly embrace this view or, in the alternative, be forced by the federal agencies involved in Bay-Delta, Club Fed and CVPIA to adopt this position.

Rejection of the water rights priority system is impermissible. In the first instance, to do so is to ignore fundamental concepts of property rights, thus violating the Fifth Amendment and Fourteenth Amendment to the United States Constitution. Even Professor Charles Wilkinson, who has written about the "death" of prior appropriation and has argued that the law of prior appropriation, as one of the "Lords of Yesterday" should not govern us today, has recognized that water is property. Indeed, he states that "water rights are the property rights of the appropriator. [He says] . . . water users do plainly possess vested property rights." *See* Wilkinson, *Crossing the Next Meridian: Land, Water and the Future of the West* (1992) at page 289.

The idea that water rights priorities somehow need not count in the current Bay-Delta, Club Fed and CVPIA process may originate, in part, from loose language within *United States v. State Water Resources Control Board* (1986) 182 Cal.App. 82. In that case, the court of appeal reviewed the SWRCB action in establishing Delta standards in its Decision 1485. There the court, through a reading of statutory and other authority, purported to find authorization for the SWRCB to ignore the historic rule of "first in time, first in right." The court stated:

> "Moreover, the power of the Board to set permit terms and conditions . . . includes the power to consider the '*relative* benefit' to be derived. . . . If the Board is authorized to weigh the values of competing beneficial uses, then logically it should also be authorized to alter the historic rule of "first in time, first in right" by imposing permit conditions which give a higher priority to a more preferred beneficial use even though later in time. (Emphasis in original.)" *Id.* at 132.

In reaching this aspect of its decision, the court of appeal ignored the property-based concepts of water rights and failed to consider the underlying economic and social reliance that is placed on the certainty provided by this system. The court, in reaching this determination, also displayed a basic misunderstanding of the application of the beneficial use criteria to modify the "first in time, first in right" rule.

The court's determination, in this regard, relies on certain provisions of California law that apply to the SWRCB's authority to act on applications for the appropriation of unappropriated water. Where two applications are pending, the determination of who should be granted the right "shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water" (Cal. Wat. Code §§ 106, 1254 (West 1971) and consideration of "the relative benefit to be derived from . . . all . . . uses of the water concerned." Cal. Wat. Code § 1257 (West 1971).

These provisions of California law had no application in the case before the court since the SWRCB, in the D-1485 process, was not dealing with applications for the appropriation of water. All of the issues before the SWRCB, in D-1485, revolved around water right permits that had previously been granted by the SWRCB or its predecessor. There is no provision of law that would allow the reprioritization of water rights once they were granted and there was, until this case, no case law which would even suggest such a notion.[8]

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8 In addition to its misconstruction of the statutes discussed above, the court of appeal also relied upon *East Bay M.U. Dist. v. Dept. of Pub. Works*, 1 Cal. 2d 476 (1934) ("EBMUD case"). This case, however, does not support the court of appeal's assertions.

That case was a proceeding in *mandamus* to compel the State Water Commission, predecessor in function to the SWRCB, to strike from a permit that it had issued the condition that "the right to store and use water for power purposes under this permit shall not interfere with future appropriations of said water for agricultural or municipal purposes." That court was dealing with section 15 of the Water Commission Act (Stats. 1913 at 1012, as amended) which read as follows:

Footnote continued on following page.

The consequence of the court of appeal's decision is two-fold. First, as noted above, grave constitutional issues with respect to the taking of vested property rights are raised:

> "The State Water Commission shall allow, under the provisions of this act, the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. It is hereby declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. In acting upon applications to appropriate water, the commission shall be guided by the above declaration of policy. The commission shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest."

The policy declaration portion of this statute is now codified as Cal. Water Code § 106 (West 1971), and the portions of the statute relating to actions of the agency responsible for acting upon applications for the appropriation of water are now codified as Cal. Water Code §§ 1253-1255 (West 1971).

> "Cal. Water Code § 106. It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.
>
> "Cal. Water Code § 1253. The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.
>
> "Cal. Water Code § 1254. In acting upon applications to appropriate water the board shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water.
>
> "Cal. Water Code § 1255. The board shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest."

The issue before the court in the EBMUD case was whether the imposition of the condition was an improper exercise of a judicial function. The holding of the case is that in imposing the condition, the agency was exercising a delegated legislative function and was not exercising a judicial function. 1 Cal. 2d at 478. The decision does not stand for any general proposition that the SWRCB is authorized to impose a term modifying the priority of a water right permit either at the time of acting upon the application for that permit, or at any subsequent time. The case stands for the proposition that the SWRCB can reject an application based upon relevant and appropriate determinations in deference to the benefit derived from a competing application, but not that it can alter priorities.

> "Valid appropriative rights, for whatever purpose of use they may have been acquired, are vested property rights. Like other forms of private property, they may be taken for public use under the laws governing the exercise of the right of eminent domain. However, other than pursuant to express conditions properly imposed by the State Water Rights Board in the issuance of a license to appropriate water, . . . there is no legislative or judicial authority in California for the enforced advancing of the priority of an appropriation for one beneficial purpose over that of a prior appropriation for another beneficial purpose, either in time of water shortage or otherwise, without making due compensation."
> W. Hutchins, *supra* note 15, at 173-74.

Second, the question of reallocation, as dealt with by the court, injects uncertainty into the water allocation system and undermines the economic and social stability that has been created around and is dependent upon that system. The court never dealt with, and there is no indication that it ever considered, either of these concerns in making its revolutionary statement.

Thus far no other California court has adopted the suggestions offered in this case. In the court's defense, the issue itself was not briefed or argued by the parties in the manner that it was dealt with by the court and, as a consequence, it may be that the court was not aware of the ramifications of its loose language. In any event, since the language at issue is merely *dicta*, it can and should be ignored.

Having outlined the general problem above, it may perhaps be useful to now focus on the individual actions that you raised in your questions to me. As noted, there are any number of federal actions which, in fact, have a direct or indirect impact on the matters at issue here.

EPA – Bay-Delta Process

Whether or not EPA has jurisdiction to proceed with flow-related standards within the Bay-Delta (regardless of how it finesses the issue) is of some significance.

The ramifications of EPA's assertion of jurisdiction are not, however, limited to California and are beyond the scope of the current discussion. For the instant purposes, it is assumed, *arguendo*, that the jurisdiction exists. The significant and immediate concern focuses on how EPA exercises its purported authority, rather than on whether that authority exists.

EPA asserts that standards must be established that protect beneficial uses of Bay-Delta waters. In this regard, EPA focuses on biological resources, dealing with, among other things, species that fall under USFWS's/NMFS's ESA authority. In 1993-1994, EPA promulgated, in coordination with other Club Fed actions, draft regulations for the Bay-Delta. (Whether the proposed standards are scientifically supported is subject to some debate.) EPA has indicated that it will impose final standards for the Bay-Delta by the end of this year.

In response to EPA's action, the SWRCB initiated a series of workshops to evaluate possible standards that it might adopt. The idea is that if the SWRCB standards are close enough to the EPA's, then EPA would defer to the SWRCB regulations. How the SWRCB will, in fact, proceed is currently unknown. The significant point, however, is that EPA's actions have forced state reaction.

An additional reaction to EPA and general Club Fed activities is the so-called joint approach developed by the California Urban Water Association ("CUWA") and some agricultural water users. The approach attempts to meet EPA's position, while minimizing the water reallocation commitment. The idea is, assuming agreement, to endorse this approach as a solution to be adopted by the SWRCB and have EPA withdraw its proposed standards.

Several related and interrelated questions are presented. The joint approach assumes that the CVPIA-reallocated 800,000 acre feet will be fully credited to meet the Bay-Delta obligations and that NMFS/USFWS will not increase the current ESA requirements involved. How these issues are addressed by the federal agencies is significant and may make the difference between whether an agreed-upon solution is possible.

Regardless of what base assumption is used for the Bay-Delta standards, little of value has been done to analyze economic and social impacts that are certain to result from imposition of the standards. As will be discussed below, it appears that the real impacts of the EPA standards will be masked. EPA does not even purport to have authority to impose its standards. As a consequence, it is uncertain what assumptions are to be made with respect to how obligations to meet these standards have been analyzed and, by extension, how economic impacts have been or will be evaluated. How these implementation issues are addressed is crucial to whether and in what manner others will embrace the EPA's proposal and the joint approach. The standards advanced by EPA may, in the abstract, be defensible, but may, in implementation, be unacceptable.

The Programmatic Environmental Impact Statement

The Club Fed process integrates implementation of the CWA, ESA and CVPIA. Long-term implementation strategies are to be developed and analyzed in the PEIS. Thus, while in the short term interim contract negotiations are of interest, the long-term pattern of water contracting will be established by policy decisions that are integrated into the PEIS. As a consequence, the PEIS may be, over the long term, the single most significant document being developed by the federal government.

The PEIS, indeed, any environmental impact statement, must have within it a no-action alternative. The no-action alternative becomes the baseline upon which other alternatives are based. The closer the no-action alternative is to the proposed action, the less impact will be shown.

The no-action alternative currently being developed for the PEIS is flawed as a result of the USBR's Club Fed decision to base the no-action alternative on regulations other than those which existed at the date of enactment of the CVPIA, October 1992. This decision has lead USBR-Club Fed to improperly incorporate within the no-action alternative conditions that did not exist at the time the CVPIA was enacted. The USBR-Club Fed decision to include ESA, 1994-1995 operational

constraints, which incorporate, to a large degree, yet-to-be-adopted CWA standards providing Delta outflow requirements, in the no-action alternative is a prime example of the problem. By including such schemes as part of the baseline conditions, the USBR will present a distorted analysis of the impacts associated with implementation of the CVPIA.

Section 3409 of the CVPIA compels the USBR to prepare a PEIS which analyzes "the direct and indirect impacts and benefits" of implementing the statute, including "all fish, wildlife and habitat restoration actions and potential renewal of all existing Central Valley Project water contracts." Implicit in that directive is that the analysis will examine the effects *on present conditions* of implementing all parts of the CVPIA. An analysis of impacts which starts from a baseline condition other than what existed in October, 1992 will fall short of that objective and cannot possibly provide an accurate assessment of the impacts or benefits associated with implementation of the CVPIA in accordance with section 3409.

Club Fed

In many respects, the answer to the matters at issue may fall within how Club Fed operates. The interrelated Club Fed statutory authority creates a situation where the whole may be greater than its parts. It may be that EPA cannot impose its standards, but the USFWS/NMFS, through ESA regulation, and the USBR, through operational leverage, may, in fact, impose these standards *de facto* and in a manner that is destructive to basic California water rights.

The best way to illustrate this point is perhaps by example. EPA jurisdiction is constrained by CWA-related limitations. While there is currently some uncertainty in the law about exactly what those limits are, or what they should be, EPA has, in the instant situation, for the most part, attempted to couch its standards in terms of water quality/salinity. In other words, instead of providing that a certain outflow of water must pass a certain point, EPA has indicated that a certain salinity must be maintained at various locations. Regardless of what ultimate basis EPA rests its assertion of regulations upon, the social and economic impacts will be the same.

The Club Fed process has, of course, thrown various federal agencies together. As a consequence, we find that USFWS has adopted as part of its ESA requirements a water quality "mixing" related requirement for delta smelt, and that NMFS has adopted similar water quality standards as part of its winter run salmon ESA requirements even though they admit that these requirements are not, in fact, necessary for winter run. Thus, you have a situation where EPA's water quality requirements are adopted by USFWS/NMFS as ESA obligations, thus forcing EPA standards implementation through the ESA.

The USBR's role in this process is even more interesting and, over the long term, may be the most harmful. The USBR operates the largest water project in California. As noted earlier, this project is coordinated operationally through the COA, with the SWP. A decision by the USBR to meet, on a voluntary basis, the EPA-Club Fed standards will, of course, have an impact on the rest of the state. The sheer size of the CVP creates leverage on the state to accommodate its operation. Thus, a decision on the part of the USBR to voluntarily meet the Club Fed-EPA standards may have the practical impact of forcing the state to comply.

As noted earlier, the Club Fed-EPA position is one of "share the pain." Under this philosophy, it does not matter that one may have junior water rights or that those rights may be subject to area-of-origin laws. If the impact of Club Fed regulations falls "unfairly" upon one group, then, it is argued, they should be spread on some kind of equitable basis. As a consequence, one means to force the state to not only adopt the EPA-Club Fed standards is to voluntarily comply with those requirements, but to only meet a "fair" percentage of the obligation. This would arguably have the effect of making the state accept not only the standards but the sharing formula devised by the Club Fed process. As noted earlier, this was the assumption analyzed as part of the 1993-1994 Club Fed draft standards analysis.

Moreover, it is an assumption that, at times, has been used as part of the no-action alternative found in the PEIS.[9]

Club Fed and the USBR cannot suggest an allocation formula that directly contradicts California water law. The CVP was constructed based upon the commitment that only water surplus to the needs of areas of origin would be exported and that, in fact, sufficient water would be reserved to meet area-of-origin needs. See, e.g., the references set forth in Attachment "A." For the USBR/Club Fed to advocate a "spread equally" allocation formula flies in the face of the promises made by the United States government.

Moreover, it is improper for the USBR/Club Fed to engage in a second-guessing of the water rights process. There is no support for a USBR/Club Fed assertion that the State should or would ignore well-established California water law when it fashions its water rights decision. If any assumption must be made, it is that the SWRCB will reallocate water to meet increased Delta outflow obligations in a manner consistent with California's law of prior appropriation and with the area-of-origin statutes. It is the economic impact associated with this implementation strategy which must be assessed.

The Bay-Delta, Club Fed and CVPIA process outlined above is calculated to control the short- and long-term future of California water. The Club Fed process not only seeks to establish what relative regulations are to be set, but also how those regulations are to be implemented. Moreover, by combining the collective authority and operational control of EPA, USFWS-NMFS and the USBR, Club Fed can force the state to comply. A combination of authority and improper analysis will also mask the true economic impacts of what is proposed.

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9 In some respects it is not clear what implementation strategy will be utilized within the PEIS. Until recently, the share-the-pain strategy was used as the means of implementation within the PEIS. Currently there appears to be no implementation discussion within the PEIS's no-action alternative, with implementation perhaps being added at some later date to an appendix.

There is no question that Club Fed has been very successful in forcing its views. The so-called CUWA-Ag joint approach is one example of how the process has forced water interests to embrace the federal view out of fear that it will otherwise be forced upon them. Unless some action is taken to force the Club Fed process to responsibly evaluate the impacts of its proposal, they will be adopted and implemented without any real consideration of the magnitude of the impacts of doing so.

In reviewing this matter, I have arrived at certain corrective measures which, I believe, must be undertaken in order to insure that the Bay-Delta, Club Fed and CVPIA actions are undertaken in a responsible manner. I have outlined these measures below:

1. The Least Harmful Economic Alternative Must Be Selected

There is a perception, real or perceived, that federal regulatory efforts are undertaken in a manner that attempts to punish agriculture. In many respects this derives from the nature of the discourse which involves third party environmental groups who clearly adhere to a "punish agriculture" philosophy. The fact that some within relevant regulatory agencies are from the environmental community, of course, fuels the perception. Moreover, the sheer quantity of water that will be reallocated from consumptive use to environmental purposes appears to justify a view that regulations and standards are being imposed in a manner that is not geared toward minimizing disruptive economic impacts.

The law does not, in any way, require that the most economically harmful alternative be chosen. Indeed, such a construction of the law would be ludicrous. The fact of the matter is that all of the relevant statutes which control in this matter require reasonable agency action which would preclude the adoption of an economically harmful alternative. Moreover, the CVPIA requires the selection of the least economically harmful alternative.

2. Regulations and Statutes Must Be Reasonable and Balanced

Choosing the least harmful economic alternative also addresses, to a degree, the requirement that any regulatory standard must be reasonable and balanced. While this may also seem obvious, the fact remains that regulatory agencies assert that they have little room to balance and that ESA limitations or EPA CWA standards must be established without regard to the ultimate impact of regulations or standards. Thus, the federal agencies seek refuge behind what they argue are inflexible statutory provisions, and in so doing attempt to divert attention from the means by which they attempt to implement the statutory provisions.

As noted above, the idea that the law would compel one to choose the most economically harmful alternative is a ludicrous assertion. In a similar measure, it is also ludicrous to assert that the law is so inflexible as to make the establishment of regulations and standards focused only on the resources to be protected without consideration of the impact that those regulations and standards would have on jobs, the economy or even the environment of the Sacramento Valley. In fact, none of the relevant statutory provisions compel such a result. See, e.g., Section 7 of the ESA which requires an analysis of "reasonable and prudent alternatives." All require the agencies to act in implementation in a reasonable fashion balancing all of the relevant interests that are involved.

Club Fed will, of course, argue that they are acting in a reasonable fashion. However, as is noted below, unless they have undertaken a real analysis of the impacts of their proposed regulations and standards, this cannot be the case. They did not do this as part of their original effort, and if the USBR's past actions with respect to its PEIS no-action alternative is a guide to where they intend to go in the future, no real economic analysis or balancing is contemplated.

Moreover, the Club Fed current focus is limited to the establishment of regulations and standards in the Bay-Delta. As a consequence, impacts are evaluated without regard to other regulatory constraints that may exist in the system. For example, evaluation of contributions to Delta outflow ignores what obligations

upstream entities may have to instream flows and habitat issues above the Delta. There are, for example, CWA obligations to protect "beneficial uses" of waters upstream from the Delta which are no less important than the mandate to protect the beneficial uses of Delta waters. There are also significant ESA-related issues in upstream areas that must be addressed.

For the most part, these upstream obligations can only be met by entities who divert and use water upstream from the Delta. Imposition of Delta obligations on these entities without consideration of limitations already imposed and to be imposed on these entities masks the total impacts of federal actions. Moreover, failing to recognize the limits that reasonably can be imposed on upstream interests also underestimates the burden that will be borne by those that export from the Delta.

In one sense the Club Fed agencies understand this. The USFWS has asserted that the Bay-Delta standards will be implemented with CVPIA fish doubling goals in mind. However, the USFWS notes that, to the extent that the goals are not met through Bay-Delta standards implementation, they will be met upstream.

In spite of this obvious interrelationship, to date no broader analysis of impacts associated with this type of regulatory intent has been undertaken. The federal agencies must adopt and analyze a broader view of proposed actions in order to insure that the total impacts of their actions are evaluated.

3. The Concept of "Share the Pain" Must Be Rejected

The "share-the-pain" concept articulated by Club Fed is one that assumes that Club Fed regulatory actions, i.e., actions taken pursuant to the ESA, CWA and the CVPIA, will cause a change in Delta water facilities operations or a reallocation of water which will create a degree of adverse impact (both direct and indirect) to those who otherwise are dependent upon the water and operations affected by the Club Fed decisions. Based upon this assumption, Club Fed argues that it would be inequitable for the entire adverse impact of the regulations to fall on any one group

of users, for example, water exporters below the Delta who, because of their reliance on junior water rights, would and, in fact, have born the brunt of regulatory reductions of water supply.

Instead, Club Fed suggests that the fair way to proceed is to allocate the obligations at issue equitably among all water users. Thus, the total impact of the regulations will not be borne by junior appropriators but, rather, it will be spread among a broader universe of water users. The prospect, from an upstream senior water right holder's perspective, is a reduction of supply regardless of the relative priority of water rights and regardless of the relationship of the diversions in question to the problem being addressed in the Delta.

The proposal ignores California water law and the relative priorities and property rights established under that body of law. Any allocation of obligations not linked directly to specific actions by water users must be allocated by priority, not on a proportionate basis. An allocation that ignores relative priority ignores the property rights of those who hold senior water rights. Proceeding in this manner also undercuts the water rights system itself and the certainty that that system was created to insure. Uncertainty not only affects those agricultural and urban interests with prior water rights that rely upon certainty in those water rights, but also undercuts the ability to reallocate water through water transfers.

Assuming a priority to water and that the fundamental issue being addressed is a Delta outflow related requirement, the "cause" of more limited outflow is the diversion of water above that which should be diverted at any given time. In other words, junior appropriators may be diverting water when no water is, in fact, available for appropriation under their junior right. The solution is not, as Club Fed would have one accept, to ignore the priorities involved; instead, it should be to invoke the priority system to address the problem. In this regard, it may be that the impact of the standards and regulations on junior right holders is simply too great. In this situation, the answer is not to arbitrarily allocate the obligation elsewhere, but rather to modify the regulation so it is imposed in a reasonable and balanced fashion.

Asserting that the "share-the-pain" concept advanced by Club Fed is not an appropriate way to proceed does not mean that there is no Delta outflow obligation that must be met by upstream senior right holders. The proper allocation of responsibility, however, must be through an application of the water rights priority system with senior right holders having to curtail their diversions only after junior water right holders' diversions have been curtailed. There may, in fact, under this scenario, be a number of years where upstream diverters will have to forego diversions or make releases from storage in order to meet Delta outflow obligations. The impacts of this means of proceeding, of course, will need to be evaluated against the reasonableness standard.

I recognize that in practice allocation of a Bay-Delta obligation by priority may be difficult. This is because the administration of the water rights system in California may not be fine-tuned enough to distribute obligations to all water right holders based upon pure priority.

The priorities that can be dealt with readily are those rights granted since 1914 for which a license or permit exists. There is little question that these rights can and should be affected first by the Delta obligation in inverse order of priority. After all, a determination that more water is needed for Delta outflow is just another way of determining that not as much water is available for appropriation and diversion as was thought when these junior water rights were granted.

Assuming that these junior right holders have refrained from the diversion of the natural flow, and additional water is still needed to meet the Delta obligation, then pre-1914 water right holders' right to divert natural flows may be affected. The problem is, however, that determining the relative priorities of the pre-1914 water rights may be difficult, if not impossible, without a system-wide adjudication. As a consequence, it may be necessary to allocate to all pre-1914 water right holders, as a class, an obligation to meet the outflow requirements that may be left. The attractiveness of proceeding in this way is

further enhanced when one recognizes that to meet a Delta outflow obligation one must seek contributions from every stream tributary to the Delta. This process, as applied to pre-1914 water right holders, would undoubtedly take more time, money and effort than can be justified. Proceeding as recommended here would anchor the process in the water rights system while still allowing for some means of practical administration.

The net result of proceeding to allocate Delta obligations based upon water rights priorities is that junior appropriators will bear the most significant burden. This fact alone is not a justification to ignore property rights in water. In this regard, I am mindful that the CVP and SWP may have to meet most of the obligation. This is the result, however, of the relative junior status of the water rights that exist for those projects and their sheer size, as opposed to any defect in the water rights system. Indeed, the system recognized that this would be the result in times of shortage and both the CVP and SWP proceeded with this knowledge. The fact that the shortage is caused by regulatory actions as opposed to drought makes no difference.

I have heard this result called "unfair." In fact, the result may not be "fair." However, this does not even come close to a legitimate rationale for ignoring the property rights based system of water law which exists in this state. This does not mean, however, that we should ignore or be insensitive to the burdens that may be imposed on CVP/SWP export contractors. We must be concerned about these water users.

As noted elsewhere, in response to the coercive effect of the Club Fed process, many of these entities have developed an approach that would address the Club Fed mandate in a more rational fashion. In my view, we should endorse this approach with two qualifications.

First, it, as well as the Club Fed proposal, should be scrutinized pursuant to a proper economic analysis. This analysis may lead to an adjustment of the

proposal to account for a reasonable balance of interests. The acceptance and application of standards without a proper balancing is simply unacceptable.

Second, the economic analysis must contemplate implementation through the property-based prior rights system of California water law. Thus, the disproportionate economic impacts discussed above must be recognized, evaluated and balanced as part of the standard-setting process.

The prior rights system of law should be viewed in a way that can assist in addressing the potential burdens of implementation. Water rights are property rights.

In explaining property rights in water, Professor Frank Trelease, back in 1974, offered an analogy to another resources with which we are all quite familiar and which, like water, must be wisely protected, sometimes preserved from use, and which must be shifted from old uses to new and more desirable uses as times and needs change. Professor Trelease stated that in understanding the idea of property rights in water, we should "think land."

> "Land is just as valuable and indispensable a resource as water. Our lives and our wealth depend upon it. The government, the ultimate source of title, wishes to see that the resource is put to its highest and best use. . . . [I]t could have distributed land through a "land bureaucrat" [who would] . . . allow its temporary use for particular regulated purposes at will or for a term of years, but when a new or better use is seen, reallocate it by moving off the present tenant and installing a new one. [But that is not what is done.] Instead, the government allocates the land in discrete and identifiable parcels, as private property. The land laws make these property rights very firm and secure. Land is then available for use by individuals to produce wealth. Since each person will try to make the best use of it that he can, the total of individual wealth will approach the production of maximum national wealth. Yet new and more productive uses by a different person may come to be seen desirable. Since the land is a valuable asset, if it were to be transferred to another person without compensation, the first holder would be impoverished and the later enriched. Therefore,

> the laws provide that the property rights are not only secure but are also voluntarily transferable. The land can be bought by the new user for the new purpose by paying the owner a price. In most cases the government is willing to let the change occur because it knows the new use is better than the old, since otherwise the buyer could not afford to pay the seller the capitalized value of the seller's use plus a profit. If private land uses and transfers are likely to have harmful effects on others, however, zoning law, land use planning laws and other regulatory devices may be used to prevent the harm. If the government comes to need the land for a public purpose that outweighs its value for private purposes, it has power to condemn it. In this fashion, social plans for schools, roads, parks, green belts and housing projects are implemented. If such needs are known before the government has disposed of the land, it may reserve it and prevent the acquisition of private rights: no homesteads in Yellowstone Park." Trelease, *"The Model Water Code, the Wise Administrator and the Goddam Bureaucrat"*, 14 Nat. Resources J. 207 (1974).

The solution to the disproportionate burden that might have to be borne by junior water right holders is not to do away with the law of prior appropriation but to strengthen it. Recognizing existing property rights in water allows one to fully rely upon a basic and essential attribute of any property right which is alienability -- the right to transfer that right to others. Thus, a recognition of the prior rights system should allow the shift of water toward junior appropriators so that adverse impacts to those entities and individuals can be avoided. Free market transfer can be facilitated by the federal government. However, free market in water rights can only be advanced if the federal government first adheres to the system of California water rights which recognizes relative priorities.

One final point should be made with respect to the application of the prior rights system of law. To this point I have focused exclusively on the protection of exercised water rights. However, as noted earlier, certain promises, in the nature of priority guarantees, were made to areas of origin, upstream of the Delta. The burdens associated with the Club Fed – ESA – CWA obligations should not be borne by these entities. Indeed, it is simply unconscionable for the federal agencies to attempt to spread the Delta obligation to areas upstream of the

Delta. The CVP was developed based upon the concept that only water surplus to the needs of these areas would be developed and exported as Project water. Since the CVP cannot, at all, justify its failure to fully contract with entities within the areas of origin, such as those on the Tehama-Colusa Canal, it certainly cannot insist on these same areas contributing to the Delta obligation. Transfer proposals must also honor these area-of-origin rights. Providing areas of origin with a right of first refusal to a percentage of water available for transfer, for example, may be one means of protecting areas of origin while also addressing the question of third party impacts.

4. True Economic Impact Analysis Is Essential

In the past, the actual economic impacts of proposed Club Fed actions have been masked through utilization of the share-the-pain concept, as well as through an approach that hides individual agency actions and impacts with other actions and impacts. As a consequence, for example, the impacts of the CVPIA are masked by its incorporation of ESA and CWA regulations and standards. The impacts of the ESA are masked by asserting that they would be imposed by the CWA, in any event, and the CWA standards are masked by an assertion that, for the most part, they are only an adoption of ESA limits. The net result of this endless circular game is that one never is able to properly evaluate either incrementally or cumulatively the true impacts of federal actions.

This past practice is likely to be repeated. As noted, this is the exact approach that, until recently, had been adopted as part of the PEIS's no-action alternative. This approach must be rejected. The public is entitled to know the full impact of the proposed regulations and standards, including the consequences of each action, as well as the cumulative impact of all of these actions together.

5. The PEIS No-Action Alternative Must Reflect an October, 1992 Baseline Condition

The no-action alternative is an essential component of the PEIS. It is the foundation upon which the entire impact analysis rests. Moreover, as noted

elsewhere, it will have ramifications far broader than just the operation of the CVP. As a consequence, the no-action alternative must reflect an October, 1992 baseline condition and must also adhere to California water rights law, including water rights priorities and area-of-origin laws.

While valid arguments exist that the root cause of the problems described above can be found in the various statutory provisions noted above, those arguments go beyond what is of immediate importance. On a very fundamental level, the problem is rooted in how the statutes at issue are being implemented and, as a consequence, proposed solutions focus on modifications in implementation. Modification of implementation policies should be developed along the following lines.

- Implementation of regulatory provisions associated with the CWA, ESA and CVPIA must be undertaken in a manner that minimizes the loss of jobs and minimizes adverse impacts to the economy.

- Implementation of regulatory provisions associated with the CWA, ESA and CVPIA must be undertaken in a reasonable and balanced fashion. Prior to imposing regulations in the Bay-Delta, there must be analysis of environmental obligations in upstream areas. In this way, the total impact of regulations can be evaluated.

- "Share the pain" cannot be an Administration policy. Rather, the means by which regulations are imposed should be a matter of state law. Property rights, including water rights priorities and area-of-origin protections, must be honored and adhered to. The impact of regulations on any group of water users must be part of the analysis undertaken in developing federal regulations and standards. These regulations and standards may need to be modified if they have an unreasonable impact on any group of water users. Water transfers, facilitated by federal agencies, may be one means by which regulatory impacts can be minimized.

- Economic analysis of regulations and standards must be undertaken in a way that discloses, rather than masks, economic impacts. The consequence of each action must be evaluated as must the cumulative impacts of all proposed actions together.

- The CVPIA's PEIS's no-action alternative must use as a basis the operation of the CVP in October, 1992. All proposed alternatives should be evaluated against this baseline.

I am certain that the foregoing will be the subject of a great deal of discussion and that some of the views expressed may need further refinement. Nonetheless, I believe that it provides the means through which meaningful dialogue on these issues can be initiated. Please do not hesitate to contact me if you have any questions or need additional information.

Very truly yours,

Stuart L. Somach
Attorney

SLS:sb

cc: Board of Directors

Encl.

THE SECRETARY OF THE INTERIOR

WASHINGTON

NOV 3 1994

Honorable Richard H. Lehman
House of Representatives
Washington, D.C. 20515

Dear Mr. Lehman:

Thank you for your letter of May 24, 1994, cosigned by Representatives Calvin Dooley and Gary A. Condit, regarding implementation of the Central Valley Project Improvement Act (CVPIA).

As discussed in your letter, the dedication of 800,000 acre-feet of Central Valley Project yield for fish and wildlife raises many issues regarding other purposes of the Act, including meeting the Bay/Delta water quality needs; satisfying requirements of the Endangered Species Act for winter-run chinook salmon and delta smelt; and delivery of water for agricultural uses. The primary use of the 800,000 acre-feet will be to double the anadromous fishery in Central Valley streams. Meeting these purposes is a significant challenge and one we do not take lightly. The Fish and Wildlife Service and Bureau of Reclamation have been involved in extensive coordination to establish an approach to meet these purposes to which both agencies are committed.

I recognize that this very significant Act can provide fertile ground for debate on meaning and intent. However, I believe we can all agree that the significant questions do not necessarily rest with exact calculations in acre-feet, but with achieving the primary purposes of the CVPIA. Please be assured that the Department of the Interior is committed to achieving the goals of the Act in an expeditious manner. I anticipate having guidelines on use of water and implementation of other priority actions in the near future. Your input and support is critical to all of us in this endeavor.

I am committed to establishing the foundation for decades to come that will result in productive fish and wildlife resources living in harmony with agricultural and urban interests in California.

If I can be of further assistance, please do not hesitate to call.

Sincerely,

Bruce Babbitt

A HISTORY OF WATERSHED PROTECTION

THE SACRAMENTO VALLEY OF CALIFORNIA

California RICE Industry Association

710 University Avenue
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WATERSHED PROTECTION:
FEDERAL ACTIVITIES AND LAWS

SELECTED EVIDENCE OF FEDERAL INTENT THAT THE CENTRAL VALLEY PROJECT BE SUBJECT TO STATE LAW

1. "The Act of March 3, 1891...leave(s) the disposition of the water to the state." -

> "The 1891 Act relegated the matter of appropriation and control of all natural sources of water supply in the State of California to the authority of that state. The Act of March 3, 1891, deals only with the right-of-way over the public lands to be used for the purposes of irrigation, leaving the disposition of the water to the state." H.H. Sinclair, 18 ID 573, 574 (1894).

2. "The United States does not control the water. It controls only the reservoir sites..."

> The United States does not control the water. It controls only the reservoir sites in which the water may be collected. The water is under the control of the states." 29 Cong. Rec. 1948-1949 (1897) (Cong. Lacey).

3. "The distribution of the water...should be left to the settlers..."

> "The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with state laws and without interference with those laws or with vested rights." Theodore Roosevelt, HR Doc. No. 1, 57th. Cong., 1st. Sess., XXVIII (1901).

"Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state..."

> "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the secretary of the interior, in carrying out the provisions of this act, shall proceed in

conformity with such laws, and nothing herein shall in any way affect any right of any state or of the federal government or of any land owner, appropriator, or user of water, to, or from an interstate stream or the waters thereof: Provided that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." Reclamation Act of 1902 (43 USCS §§ 371m 383.)

4. "...even an appropriation of water can not be made except under state law."

"The bill (the Reclamation Act of 1902) provides explicitly that even an appropriation of water can not be made except under state law." 35 Cong. Rec. 6687 (1902) (Cong. Mondell).

5. "If the appropriation and use were not under the provisions of the state law the utmost confusion would prevail."

"If the appropriation and use were not under the provisions of the state law the utmost confusion would prevail." 35 Cong. Rec. 6770 (1902) (Cong. Sutherland).

6. "...the authority of each state in the disposal of the water...was unquestioned and supreme..."

"It has heretofore been assumed that the authority of each state in the disposal of the water supply within its borders was unquestioned and supreme,..." E. Mead, Irrigation Institutions 372 (1903). -

"...the Bureau of Reclamation fully recognizes and respects existing water rights..."

"...the Bureau...has complied with California's 'County of Origin' legislation...only surplus water will be exported elsewhere."

"In conducting irrigation investigations and constructing and operating projects throughout the west, the Bureau of Reclamation fully recognizes and respects existing water rights established under state law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure. This basin report on the Central Valley is predicated on such a policy." "Comprehensive Departmental Report on the Development of the Water and Related Resources of the Central Valley Basin" (August, 1949, Sen. Doc. 113, 81st Con., 1st Sess.)

The report went on to state:

'In addition to respecting all existing water rights, the Bureau of this report has complied with California's 'County of Origin' legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus water will be exported elsewhere." "Comprehensive Department Report on the Development of the Water and Related Resources of the Central Valley Basin" (August, 1949, Sen. Doc. 113, 81st Con., 1st Sess.)

7. "Since it is clear that the states have control of water within their boundaries...the California Constitution...protects the vested rights of...owners for present and prospective beneficial uses to which the lands are or may be adaptable..."

"Since it is clear that the states have control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the state, if there is to be proper administration of the water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st. Sess., 3, 6 (1951).

"Sections 11460, 11463 and 10505 are in keeping with the provisions and the policy of (the California Constitution) which permits and requires reasonable and beneficial use, and which protects the vested rights of the riparian and overlying owners for present and prospective beneficial uses

to which the lands are or may be adaptable; and they extend by statute the protection given to riparian and overlying owners by the (California Constitution) to all inhabitants and property owners of the County in water which may be necessary for the development of the County and which protection they only incidentally and indirectly received prior to (the adoption of Article X, § 2 of the California Constitution)." Rank v. Krug (1956) 142 F. Supp. 1, 150.

8. "...the Attorney General handed down an opinion which held...that the provisions of Sections 11460 and 11463 are imposed upon any agency of the State of California or United States..."

"In Opinion 53/298 filed January 6, 1955 (25 Ops. Cal. Atty. Gen. 8), the Attorney General (Pat Brown) handed down an opinion which held among other things, that the provisions of Sections 11460 and 11463 are imposed upon any agency of the State of California or United States by virtue of the statute, regardless of their inclusion or omission in any permit issues by the State Engineer. In that conclusion, the Court agrees." Rank v. Krug (1956) 142 F. Supp. 1, 150.

9. "The assignments by the Department of Finance to the United States were thus ineffectual to transfer anything except the right to pursue the applications to permit, under the terms and conditions of the California Water Code."

"The assignments by the Department of Finance to the United States were thus ineffectual to transfer anything except the right to pursue the applications to permit, under the terms and conditions of the California Water Code." Rank v. Krug (1956) 142 F. Supp. 1, 153.

10. "Project plans must comply with state legal provisions or priorities for beneficial use of water."

> "State and federal law and policy established the framework for project formulation. Project plans must comply with state legal provisions or priorities for beneficial use of water." United States Department of Interior, Bureau of Reclamation, Reclamation Instructions Section 116.3.1 (1959).

WATERSHED PROTECTION:
STATE OF CALIFORNIA ACTIVITIES AND LAWS

SELECTED EVIDENCE OF STATE INTENT TO PROTECT COUNTIES/WATERSHEDS OF ORIGIN

1. "...diversion of surplus waters from the Sacramento River into the San Joaquin Valley... gives full protection against present or future loss..."

> "In fact, the whole discussion of the diversion of surplus waters from the Sacramento River into the San Joaquin Valley, must be predicated from the institution of a coordinated development in both valleys that gives full protection against present or future loss to the owners of vested rights into present users of water as well as to those potential users whose lands lie tributary to streams from which exportations of water are proposed." Bull. No. 9, Div. of Engineering and Irrigation, Dept. of Public Works (1925) p. 18.

2. "...new supplies...would be taken from areas of surplus after providing for their completed development."

> "The new supplies for the deficient areas would be taken from areas of surplus after providing for their complete development." Bull. No. 12, Div. of Engineering and Irrigation, Dept. of Public Works (1925) p. 48.

3. "...no water should be diverted from the area of origin which is now or may ever be required for any beneficial use..."

> "In supplying areas of deficiency of water from areas of surplus, only such water as is not needed to serve vested or other property rights, or necessary for supplying the uses and purposes hereinbefore mentioned should be considered and no water should be diverted from the area or origin which is now or may ever be required for any beneficial use within such area of origin." Report of Joint Legislative Committee Dealing With the Water Problems of the State, January 18, 1929, p. 19.

4. "It shall be the policy of the state to extend to the areas of surplus water...definite and valid assurance that such areas...shall have a right to ample water for their ultimate needs..."

> "It shall be the policy of the state to extend to the areas of surplus water, from which, under the coordination policy or development thereof, areas of deficient water may obtain a supply, definite and valid assurance that such areas of surplus from which water is or may be taken shall have a right to ample water for their ultimate needs, superior and prior to that of the areas of deficiency to make use of such surplus." Supp. Report of Joint Legislative Committee Dealing With the Water Problems of the State, April 9, 1929, p. 5.

5. "...basins favored with water in excess of their needs would be furnished a regulated supply in accordance with the requirements of their ultimate development."

> "Under this plan, the basins favored with water in excess of their needs would be furnished a regulated supply in accordance with the requirements of their ultimate development. Waters in excess of their needs would be conveyed to areas of deficiency..." Bull. No. 25, Div. of Water Resources, Dept. of Public Works, January 1, 1931, p. 35.

6. "No priority under this part...shall...deprive the county in which the appropriated water originate of any such water necessary for the development of the county."

> "No priority under this part (Part 2, Appropriation of Water by Dept. of Finance) shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originate of any such water necessary for the development of the county." Water Code § 10505 (stats. 1931, Ch. 720, p. 1514.)

7. "...a watershed or area wherein water originates ...shall not be deprived...of the water reasonably required to adequately supply the beneficial needs of the watershed..."

> "In the construction and operation by any authority of any project under the provisions of this part (Part 3, Central Valley Project), a watershed or area which water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein." Water Code § 11460 (stats. 1933, Ch. 1042, p. 2650, § 11.)

8. "Section 11460 has the effect of reserving to the entire body of inhabitants and property owners in watersheds of origin a priority..."

> "Section 11460 has the effect of reserving to the entire body of inhabitants and property owners in watersheds of origin a priority as against the water project authority in establishing their own water rights in the usual manner as their needs increase from time-to-time up to the maximum of either their ultimate needs or the yield of the particular watershed." 25 Ops. Cal. Atty. Gen. 8, 20 (1955).

9. "The priority...of watersheds...may not in any way be defeated..."

> "The priority thus reserved to inhabitants of watersheds of origin by section 11460 may not in any way be defeated by any action or proceeding by the authority." 25 Ops. Cal. Atty. Gen. 8, 22 (1955).

10. "...it should be noted that the statute imposes the limitations in any event..."

> "Therefore as to either state or federal agencies engaged in construction and operation of the Central Valley Project, the state engineer may incorporate into his permit as conditions thereof the limitations on the powers of assignees established by sections 11460 and 11463. However, it should be noted that the statute imposes the limitations in any event, regardless of their inclusion or omission from the permit." 25 Ops. Cal. Atty. Gen. 8, 32 (1955).

NCWA
Northern California Water Association

November 16, 1994

Ms. Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

Dear Administrator Browner:

I am writing on behalf of the members of the Northern California Water Association (NCWA) regarding our views on the Federal Club-Fed process. This process includes efforts to establish water quality standards for the Sacramento/San Joaquin Delta and San Francisco Bay (Bay/Delta), to impose Endangered Species Act restrictions and to implement provisions of the Central Valley Project Improvement Act. We also would like to share our views with respect to State efforts to address these issues.

NCWA supports State and Federal efforts to protect the valuable natural resources of the Central Valley and the Bay/Delta. We believe, however, that environmental protections must be balanced with the real social and economic consequences that often arise as a result of these efforts. We also believe water quality standards and regulations for the Bay/Delta that are ultimately adopted must be implemented in a strict adherence with California law, including the water rights priority system and area-of-origin statutes.

In attempting to understand the magnitude of the Club-Fed process and possible State action, we have requested the general counsel of the Glenn-Colusa Irrigation District, an NCWA member, to provide his analysis on these issues. I have enclosed this analysis for your review. The enclosed letter serves as an initial explanation that clearly articulates NCWA's position and outlines an approach as to how we can proceed together, from this point forward, to properly address these serious issues. We will, in the next few weeks, supplement this document with additional materials that further discuss the NCWA position.

Please call me if you would like any additional information regarding our views in this matter.

Sincerely,

Richard Golb

Richard Golb
Executive Director

Senator Hotel Office Building
1121 L Street, Suite 904
Sacramento, California 95814
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EXECUTIVE SUMMARY

Currently, various federal actions are being developed which could have a significant and adverse effect upon Northern California water rights.[1] The actions emanate from the so-called "Club Fed" process which combines the authority of the Environmental Protection Agency ("EPA") in the context of the formulation of Clean Water Act ("CWA") standards for the Bay-Delta, with the United States Fish and Wildlife Service's ("USFWS") and National Marine Fisheries Service's ("NMFS") authority pursuant to the Endangered Species Act ("ESA") and the United States Bureau of Reclamation's ("USBR") obligations associated with the Central Valley Project Improvement Act ("CVPIA").

The Club Fed process is designed to control the short- and long-term future of California water. The Club Fed process not only seeks to establish the specific Bay-Delta water quality standards to be adopted, but also how those standards will be implemented. By combining the collective authority and operational control of EPA, USFWS-NMFS and the USBR, Club Fed can, by coercion, force the State of California to comply with the federal mandate.

At this point, the Club Fed process does not balance its proposed standards and regulations with the potential harm it is certain to cause to vital social and economic interests within California. It masks the actual impacts of any one federal action with a faulty analysis which assumes that other regulatory actions

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1 While couched in terms of Northern California water rights, the same, in essence, is true with respect to any upstream area within California where senior water rights exist and where so-called area-of-origin protections apply.

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are in place, despite the fact that they are not. As a consequence, no true baseline is established upon which to evaluate the cumulative impacts of the entire Club Fed process.

Additionally, the Club Fed process further masks the potential economic and social impacts of its proposed standards and regulations by ignoring the property based prior appropriation system of California law. Instead, Club Fed endorses a "share-the-pain" concept for implementation of its regulations and standards. This concept assumes an "equitable" allocation of responsibility to meet Bay-Delta standards ignoring property rights, including water rights priorities and area-of-origin entitlements.

In addition to violating the Fifth and Fourteenth Amendments to the United States Constitution, ignoring the California water rights system destabilizes the very certainty this system of law was designed to create. The economic and social instability that would result from the dismantling of the water rights system would first be felt in the collapse of water marketing efforts within California which are based upon certainty in underlying water rights. The consequences would next be felt throughout the financial sector by a lack of financing for water and related projects which are dependent upon a degree of certainty in water supply.

The coercive pressure associated with the Club Fed process has, of course, already been felt among export water users. As a result, those water users have

developed a joint approach for dealing with the Club Fed mandates. This approach could be endorsed with two qualifications.

First, it, as well as the Club Fed proposal, should be scrutinized pursuant to a proper economic analysis. This analysis may lead to an adjustment of the proposal to account for a reasonable balance of interests. The acceptance and application of standards without a proper balancing is simply unacceptable.

Second, the economic analysis must contemplate implementation through the property-based prior rights system of California water law. Thus, the disproportionate economic impacts discussed above must be recognized, evaluated and balanced as part of the standard-setting process. The prior right system of law should be utilized to reallocate, through water transfers, water from where uses may be modified to those export areas which otherwise would be water short.

Finally, in this regard, the priority guarantees found within the area-of-origin laws must be honored. As a consequence, the burden associated with the Club Fed process should not be borne by entities and individuals within the areas of origin.

The issues outlined here are obviously of great concern. They are also hard to fully comprehend in light of the interrelationship of state and federal law and the various federal agencies involved. The danger is that in responding to any one aspect of the problem, there is a great danger that unintended harm will

result. As a consequence, the specific issues raised here must be dealt with as part of a greater policy directive. These directives include the following:

- Implementation of regulatory provisions associated with the CWA, ESA and CVPIA must be undertaken in a manner that minimizes the loss of jobs and minimizes adverse impacts to the economy.

- Implementation of regulatory provisions associated with the CWA, ESA and CVPIA must be undertaken in a reasonable and balanced fashion. Prior to imposing regulations in the Bay-Delta, there must be analysis of current obligations due to state and federal regulations in upstream areas. In this way, the total impact of regulations can be evaluated.

- "Share the pain" cannot be an Administration policy. Rather, the means by which regulations are imposed should be a matter of state law. Property rights, including water rights priorities and area-of-origin protections, must be honored and adhered to. The impact of regulations on any group of water users must be part of the analysis undertaken in developing federal regulations and standards. These regulations and standards may need to be modified if they have an unreasonable impact on any group of water users. Water transfers, facilitated by federal agencies, may be one means by which regulatory impacts can be minimized.

- Economic analysis of regulations and standards must be undertaken in a way that discloses, rather than masks, economic impacts. The consequence of each action must be evaluated as must the cumulative impacts of all proposed actions together.

- The CVPIA's PEIS's no-action alternative must use as a basis the operation of the CVP in October, 1992. All proposed alternatives should be evaluated against this baseline.

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November 15, 1994

Mr. Richard K. Golb
Executive Director
Northern California Water Association
1121 L Street, Suite 904
Sacramento, CA 95814

Re: Northern California Water Rights

Dear Mr. Golb:

You have asked me, as General Counsel for the Glenn-Colusa Irrigation District ("GCID"), a member of the Northern California Water Association ("NCWA"), to provide my views with respect to the current Bay-Delta process, the so-called " Club Fed" process and the Bureau of Reclamation's ("USBR") implementation actions associated with the Central Valley Project Improvement Act ("CVPIA"). In particular, you have asked me to provide you with my thoughts on how these various actions may affect Northern California water rights.[1] I have spent a great deal of time thinking about this matter and offer the following as a means to both share my views with you and to facilitate further discussion.[2]

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1 While the question addressed here focuses on Northern California water rights, the same analysis, in essence, would apply to any upstream area within California where senior water rights exist and where the so-called area-of-origin protections apply.

2 In order to maximize a broad understanding of the points developed in this letter, I have attempted to minimize detailed legal argument. As a consequence, some of the statements I make about the law are conclusory in nature. I have, however, developed background legal memoranda which support each of these conclusions. These background memoranda are available upon request.

While I attempt below to explain the Bay-Delta, Club Fed and CVPIA process in detail, in a most fundamental way, the issues and problems faced here are not new. They are, in essence, water supply problems stemming from either shortage of supply or problems associated with the location and distribution of water. These problems, in most respects, define the West, including California.

As you know, I teach a course in Natural Resources Law and Public Land Law; and since most of what is dealt with is western in nature, I focus on this physical/cultural fact a great deal. I attempt to remind my students that they must understand the uniqueness of the West in order to understand the law of the West as it addresses natural resources. It is difficult because the mini-culture of California masks the broader western culture which underlies us all. In attempting to establish this point I like to quote from a famous western author, Wallace Stegner.

> "[T]he western landscape is more than topography and landforms, dirt and rock. It is, most fundamentally, climate – climate which expresses itself not only as landforms but as atmosphere, flora, fauna. And here, despite all the local variety, there is a large, abiding simplicity. Not all the West is arid, yet except at its Pacific edge, aridity surrounds and encompasses it. Landscape includes such facts as this. It includes and is shaped by the way continental masses bend ocean current, by the way the prevailing winds blow from the West, by the way mountains are pushed up across them to create well-watered coastal or alpine islands, by the way the mountains catch and store the snowpack that makes settled life possible in the dry lowlands, by the way they literally create the dry lowlands by throwing a long rain shadow eastward . . . .
>
> "Aridity, more than anything else, gives the western landscape its character. It is aridity that gives the air its special dry clarity; aridity that puts brilliance in the light and polishes and enlarges the stars; aridity that leads the grasses to evolve as bunches rather than as turf; aridity that exposes the pigmentation of the raw earth and limits, almost eliminates, the color of chlorophyll; aridity that erodes the earth in cliffs and badlands rather than in softened and vegetated slopes . . . . The West, Walter Webb said, is 'a semi-

desert with a desert heart' . . . . [T]he primary unity of the West is a shortage of water.

"The consequences of aridity multiply by a kind of domino effect. In the attempt to compensate for nature's lacks we have remade whole sections of the western landscape. The modern West is as surely Lake Mead, . . . Lake Powell, [Lake Shasta] and the Fort Peck reservoir, the irrigated greenery of the Salt River Valley and the smog blanket over Phoenix [and Los Angeles], as it is the high Wind River Range or the Wasatch or the Grand Canyon. We have acted upon the western landscape with the force of a geological agent. But aridity still calls the tune, directs our tinkering, prevents the healing of our mistakes; and vast unwatered reaches still emphasize the contract between the desert and the sown."[3]

* * *

"California, which might seem to be an exception, is not. Though from San Francisco northward the coast gets plenty of rain, that rain, like the lesser rains elsewhere in the state, falls not in the growing season but in winter. From April to November it just about can't rain. In spite of the mild coastal climate and an economy greater than that of all but a handful of nations, California fits Walter Webb's definition of the West as 'a semi-desert with a desert heart.' It took only the two-year drought of 1976-77, . . . to bring the whole state to a panting pause. The five-year drought from 1987 to 1991 has brought it to the point of desperation."[4]

It is out of this basic understanding of the West that solutions to the inherent water supply problems outlined above were identified. In this regard, the law formed around the idea that it ought to provide a degree of certainty in what otherwise was an inherently uncertain situation. The law that was formed was the law of prior appropriation.

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3 Stegner, *Where the Bluebird Sings to Lemonade Springs* (1992) at pages 16-17.

4 *Id.*, at page 60.

While there is some dispute as to its actual origin, for the instant discussion, it is sufficient to state that the doctrine of prior appropriation paralleled the establishment of mining laws by those who had flocked to California during the gold rush. Many of the mines established in California during that era were placer mines, and placer mines require water for operation. Two limitations on the availability of water had to be dealt with. First, the mines themselves were not always near the water source, requiring the water to be diverted from the source and conveyed, sometimes over great distances, for use at the mine sites. Second, there was not always enough water to serve the needs of all of the miners who wanted to use it.

The riparian doctrine utilized in the pluvial East did not meet the miners' needs. In the first place, the doctrine had been developed based upon the notion that water was to be used on land appurtenant to the stream from which it was being taken. Additionally, the doctrine had been developed in an area where there was no shortage of water and thus no mechanism for dealing with the allocation of water in the case of shortages.

As a consequence of the inadequacy of eastern riparian law, the miners adopted a legal system for the allocation of water which accommodated their needs. This method of allocating a limited supply of water among numerous miners has been termed the doctrine of prior appropriation. The doctrine, like the mining law from which it originated, has as its center the rule of "first in time, first in right." Additionally, water was limited to the amount originally appropriated and the right to use water could be lost (as could a mining claim) through abandonment.

This method of water allocation proved to be well-suited for life in the arid and semi-arid West. Indeed, it was so successful that it spread from the California mining fields to the rest of the West.

The significance of the doctrine's origin is that it is tied to the economic and social needs within the areas in which it developed. As noted by the California Supreme Court in *Irwin v. Phillips*, 5 Cal. 140 (1855):

> "Courts are bound to take notice of the political and social condition of the country, which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata*. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the Legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law makers; as for instance, in the Revenue Act 'canals and water races' are declared to be property subject to taxation, and this when there was none other in the State than such as were devoted to the use of mining. Section 2 of Article IX of the same Act, providing for the assessment of the property of companies and associations, among others mentions 'dam or dams, canal or canals, or other works for mining purposes.' This simply goes to prove what is the purpose of the argument, that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their

> natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority upon the maxim of equity, *qui prior est in tempore, potior est in jure.* The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal recognition from the sovereign power. If it is upon a stream the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted, and for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection." *Id.* at 146-47.

Although developed through custom and usage, appropriative rights in California are now governed primarily by statute. *See* Wat. Code § 100 *et seq.* The state grants an appropriative right for the use of a specific quantity of water for specific beneficial purposes, if water is available, and if the water is free from claims of others with earlier appropriations. The right is initiated either by actual use, as is the case with pre-1914 appropriative water rights, or by application for a permit or license. The place of use is not limited to riparian lands or even to a particular watershed. The right may be conveyed and it may cease to exist if it is not used.

The single most important element in the appropriative rights system is the doctrine of priority. W. Hutchins, *The California Law of Water Rights*, 130 (1958); 1 W. Hutchins, *Water Rights Laws in the Nineteen Western States*, 396-400 (1971); 1 S. Weil, *supra* note 2, §§ 299-301, at 307-13; 1 C. Kinney, *supra* note 2, §§ 599-603, at 1043-52. The historic rule of "first in time, first in right" has been described as follows:

> "One of the essential elements of a valid appropriation is that of priority over others. Under this doctrine he who is first in time is first in right, and so long as he continues to apply the water to a beneficial use, subsequent appropriators may not deprive him of the rights his appropriation gives him . . . ." *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 26, 276 P. 1017 (1929).

The rule of "first in time, first in right" requires that a senior appropriator have first call on all available water claimed by him, with subsequent junior appropriators being able to make appropriative decisions based on knowledge of their chance to obtain an adequate supply. The right to the use of water in most jurisdictions is predicated upon the use being reasonable. In California, the right extends only to the "reasonable beneficial" use of water. *See, e.g.*, Cal. Const. art. X, § 2. This aspect of the right acts to provide an additional element of certainty in the system, because it not only guarantees the continued ability to use water so long as the use is reasonable and beneficial, but also allows the junior appropriator to limit a senior appropriator's use if the senior's use is wasteful.

In California, in addition to the law of prior appropriation, there exists a body of law commonly referred to as "area-of-origin laws." These laws serve to provide a water right priority to those areas within the State in which water originates. These laws are extensive and include Water Code section 11460, which prohibits the Department of Water Resources from depriving a watershed or area of origin of the "prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed area, or any of the inhabitants or property owners therein" and Water Code sections 10505 and 10505.5 which provide for the reservation of water for counties of origin through so-called "state filings." State filings are applications to appropriate water to benefit local areas and which contain early priority dates. Water Code section 11128 provides that the United States, in the development of the Central Valley Project ("CVP"), shall be bound by the provisions of Water Code sections 11460 and 11463 (dealing with the exchange of water from one watershed to another). I view these statutes collectively as conferring upon areas of origin certain priorities which must be honored prior to the time that water surplus to these areas' needs can be made available to others.

In *California v. United States* (1978) 438 U.S. 645, the United States Supreme Court held that the United States, in the construction and operation of

USBR projects, was bound by state law. This would, of course, include the law of prior appropriation, as well as the area-of-origin provisions of state law. Indeed, federal authorization of the CVP is replete with specific references providing assurance that area-of-origin rights would be protected and, in particular, that only water "surplus" to the needs of the Sacramento Valley would be exported.[5]

In the context of the matters that are at issue here, I recognize that when one speaks of prior water rights, the risk exists that this will be taken as an attack on the environment or on junior water right holders and those who export water through the Delta. That is not the case here.

First, I assume that certain environmental obligations must be dealt with and addressed. The issues dealt with here focus on the question of how they are to be met and whether true analysis of economic and social impacts is to be addressed.

Second, I do not view the situation from a water rights perspective as being adversarial with junior right holders and exporters pitted against senior right holders. Indeed, with certain limitations, I endorse the joint urban-San Joaquin agricultural proposal for the Bay-Delta. I do believe, however, that solutions to the water allocation problems associated with Bay-Delta standards are to be found within the prior rights system and not through the abandonment of that body of law.

It is with this foundation that the current environmental concerns being addressed as part of the Bay-Delta, Club Fed and CVPIA process must be evaluated. There are probably any number of ways to describe this process and the order of explanation may be important. I have here decided to start with the

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5 The California Rice Industry Association has prepared an interesting partial compilation of watershed protection assurances as applied to the Central Valley Project. It also includes reference to various State promises associated with watershed protection. I have included this document for reference as an attachment to this letter.

CVPIA's provision requiring the development of a programmatic environmental impact statement, because I believe that a description of that provision best captures the interrelated nature of the process with which we are faced.

Section 3409 of the Central Valley Project Improvement Act ("CVPIA") provides as follows:

> "Not later than three years after the date of enactment of this title, the Secretary shall prepare and complete a programmatic environmental impact statement pursuant to the National Environmental Policy Act analyzing the direct and indirect impacts and benefits of implementing this title, including all fish, wildlife, and habitat restoration actions and the potential renewal of all existing Central Valley Project water contracts. Such statement shall consider impacts and benefits within the Sacramento, San Joaquin, and Trinity River basins, and the San Francisco Bay/Sacramento-San Joaquin River Delta Estuary. . . ."

The provision requires the preparation of a Programmatic Environmental Impact Statement ("PEIS") to analyze two specified actions: (1) the operation of the Central Valley Project ("CVP"); and (2) the implementation of the CVPIA. This undertaking is ambitious and, as will be discussed below, by necessity includes coordination with and incorporation of standards imposed for the San Francisco Bay and Sacramento-San Joaquin Delta ("Bay-Delta") by the Environmental Protection Agency ("EPA") under the Clean Water Act ("CWA") and requirements imposed by the United States Fish and Wildlife Service ("USFWS") pursuant to the Endangered Species Act ("ESA"). There is little question that the PEIS and the policy decisions made within that document will have significant ramifications throughout California. Section 3409, therefore, not only provides a mechanism to analyze the total impacts of CVP operations, including impacts associated with the implementation of the CVPIA, but, more fundamentally, the PEIS process provides a means to comprehensively, on a broad programmatic basis, develop a long-term operation strategy for the CVP. Because of the sheer size of the CVP, as well as its

coordination with the State Water Project ("SWP"), decisions made with respect to the CVP will have a direct effect on all of California.

Pursuant to the CVPIA, there are crucial activities that cannot be undertaken prior to the completion of the PEIS. The most significant of these limitations is that CVP water contracts can only be renewed for increments of two years (after an initial three-year interim renewal) until the PEIS is completed. The long-term contracts themselves, will, of course, be negotiated and executed based upon the PEIS.

As noted above, the PEIS is to evaluate "the direct and indirect impacts of implementing . . . [the CVPIA], including all fish, wildlife, and habitat restoration actions. . . ." These "actions" include specific activities articulated in section 3406(b) of the CVPIA, including the allocation or reallocation of 800,000 acre feet ("af") of water for fish, wildlife and habitat restoration purposes, to protect waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and to meet legal obligations of the CVP, including obligations under the federal ESA. Indeed, the CVPIA, in essence, incorporates these obligations into its provisions and, thus, the impacts associated with these requirements must be accounted for and analyzed within the PEIS.[6]

For a period of time after CVPIA enactment, there was a great deal of concern that a lack of coordination between and among the United States Bureau of Reclamation ("USBR"), USFWS, the National Marine Fisheries Service ("NMFS") (with respect to ESA requirements associated with the winter-run salmon) and EPA would create a disaster with duplicative and potentially inconsistent standards being established and imposed upon water users. Most of the focus was and still is on the

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6 This interrelationship of the CVPIA and the establishment of Bay-Delta standards and the meeting of ESA obligations was noted recently by Secretary Babbitt in a letter to Congressman Lehman where the Secretary stated that "the dedication of 800,000 acre-feet of Central Valley Project yield for fish and wildlife raises many issues regarding other purposes of the Act [CVPIA], including meeting the Bay/Delta water quality needs; satisfying requirements of the Endangered Species Act for winter run salmon and delta smelt . . . ." See letter from Bruce Babbitt to Richard H. Lehman, dated November 3, 1994. A copy of this letter is attached for your information and convenience.

Bay-Delta. This focus results from EPA's rejection of past efforts by the State of California to develop Bay-Delta water quality standards.

The lack of coordination and the threats posed by it were addressed and relieved through the development of the so-called "Club Fed" process and through the subsequent, although as yet untested, coordination with the State of California in the so-called "Cal-Fed" process.

Coordination, however, through the Club Fed process, while curing one problem, creates other problems which may, in effect, be more significant than the problem Club Fed was developed to avoid. The Club Fed process blurs the lines of authority upon which individual federal actions must be predicated, thus precluding any ability to trace and properly analyze the actions being undertaken by the federal agencies. In particular, adverse impacts associated with any individual action is masked by impacts associated with other actions. The net result is, for example, the type of economic analysis that accompanied the Club Fed 1993-94 draft Bay-Delta standards. This analysis severely understated actual impacts to jobs and the economy. As will be discussed in more detail below, this blurring of authority is incorporated into the PEIS and, as a consequence, the true impacts associated with the CVPIA, ESA, and EPA may not be properly analyzed. One, of course, can only assume that this same improper economic analysis will accompany final Club Fed action later this year.

Additionally, the Club Fed process ignores the State's water rights system. EPA's CWA proposal, for example, does not even consider the limits of state water law. The USFWS's ESA activities similarly fail to recognize state water law limitations. Those agencies, together with USBR, "as a matter of administration policy" advocate a "share the pain" approach to implementation of the federally-developed standards and regulation. "Share the pain" is an implementation scheme concocted by Club Fed and advocated by others which would ignore the relative priority of water rights and, instead, allocate responsibility for Bay-Delta obligations in an "equitable" fashion devised by the regulators, thereby spreading the burden or "pain" of meeting the Bay-Delta obligations among the broadest

possible number of water users. Share the pain ignores property rights in the form of water rights priorities, because, Club Fed argues, to do otherwise "would not be fair."

Proceeding in this manner, however, not only violates the Fifth Amendment and Fourteenth Amendment protections, but also again serves to underestimate the actual economic and social impact of what is proposed. As noted, the PEIS, at least at one time, adhered to this flawed approach.[7]

While one can argue strenuously about the relative merits of the substantive provisions of the CWA, ESA and CVPIA, the issue posed here is much simpler and narrower. Assuming that the above authority exists and is appropriate, Club Fed must proceed in a manner that is the most sensitive and least destructive to the social and economic fabric of California, including sensitivity to the agricultural sector and jobs. This cannot be done unless the true impacts of Club Fed actions are analyzed rather than masked, and water rights are honored and accounted for in implementation analyses.

In proceeding, Club Fed does not start with a clean slate. Its actions are circumscribed by the laws under which it acts. Not one federal statute at issue, whether it be the CWA, ESA or CVPIA, sanctions unreasonable behavior. Not one of these statutes compels actions in an inflexible manner without some deference to economic and social consequences. Club Fed, however, articulates a philosophy which attempts to shield its actions from criticism by asserting that the actions are compelled by inflexible statutory provisions. Club Fed cannot hide behind this position. It must be able to justify its actions on the merits.

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7 I have been told that within the so-called "Cal-Fed" framework the Club Fed agencies have indicated that they will follow the SWRCB water rights process. This appears to contradict their statements to me and to others. It also ignores their actions. It could be, however, that the Club Fed agencies intend, within the SWRCB process, to argue that the prior rights system of allocating responsibility for standards and regulations should be abandoned in favor of "share the pain." At least one Club Fed agency head has indicated that this would be the case. In my view, regardless of how they justify ignoring state law, the result will be the same.

Additionally, and related to the limits of Club Fed actions, Club Fed must also be constrained by the property rights which govern the allocation of water. The EPA and USFWS, as regulators, and the USBR, as a "junior" water rights holder, may not ignore these fundamental rights. They are essential to the economic and social vitality of California and the West.

As discussed in detail above, these issues are not unique or new. In the purest sense, the current situation poses the same problem that existed at statehood – we live in an arid or semi-arid climate and there is too little water to meet the demand. The places where the water exists and the time in which it is available do not correspond with the locations and times where and when we would like to consume the water. The diversion and consumption of water (regardless of climate) from its source is bound to have an environmental consequence. In the arid and semi-arid West this consequence is likely to be significant and adverse. The construction and operation of dams, of course, compound these problems.

Assuming the foregoing is as obvious as it appears, it should also be obvious that modification of existing diversion and consumptive use patterns in order to address environmental concerns will have adverse economic and social impacts. Unfortunately, the further from California one is, there is apparently less concern about these economic and social impacts. As a consequence, federal agencies have, for the most part, been least sensitive to and less honest about the economic and social consequences of environmental protection.

Finally, in this regard, as cities and urban water demand have grown, there has been created a growing tension over the ownership of water rights. As discussed above, water rights have always been considered real property rights. These real property rights have been owned primarily by agricultural interests who were "first in time" in California. The growing tendency has been an attempt to ignore the property nature of the water right in order to facilitate reallocation. Again, perhaps because of distance, this tendency has been most prevalent at the federal level where

state water law has been seen as an obstacle to reforms wanted by federal agencies. The fear is that the State will either willingly embrace this view or, in the alternative, be forced by the federal agencies involved in Bay-Delta, Club Fed and CVPIA to adopt this position.

Rejection of the water rights priority system is impermissible. In the first instance, to do so is to ignore fundamental concepts of property rights, thus violating the Fifth Amendment and Fourteenth Amendment to the United States Constitution. Even Professor Charles Wilkinson, who has written about the "death" of prior appropriation and has argued that the law of prior appropriation, as one of the "Lords of Yesterday" should not govern us today, has recognized that water is property. Indeed, he states that "water rights are the property rights of the appropriator. [He says] . . . water users do plainly possess vested property rights." *See* Wilkinson, *Crossing the Next Meridian: Land, Water and the Future of the West* (1992) at page 289.

The idea that water rights priorities somehow need not count in the current Bay-Delta, Club Fed and CVPIA process may originate, in part, from loose language within *United States v. State Water Resources Control Board* (1986) 182 Cal.App. 82. In that case, the court of appeal reviewed the SWRCB action in establishing Delta standards in its Decision 1485. There the court, through a reading of statutory and other authority, purported to find authorization for the SWRCB to ignore the historic rule of "first in time, first in right." The court stated:

> "Moreover, the power of the Board to set permit terms and conditions . . . includes the power to consider the '*relative* benefit' to be derived. . . . If the Board is authorized to weigh the values of competing beneficial uses, then logically it should also be authorized to alter the historic rule of "first in time, first in right" by imposing permit conditions which give a higher priority to a more preferred beneficial use even though later in time. (Emphasis in original.)" *Id.* at 132.

In reaching this aspect of its decision, the court of appeal ignored the property-based concepts of water rights and failed to consider the underlying economic and social reliance that is placed on the certainty provided by this system. The court, in reaching this determination, also displayed a basic misunderstanding of the application of the beneficial use criteria to modify the "first in time, first in right" rule.

The court's determination, in this regard, relies on certain provisions of California law that apply to the SWRCB's authority to act on applications for the appropriation of unappropriated water. Where two applications are pending, the determination of who should be granted the right "shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water" (Cal. Wat. Code §§ 106, 1254 (West 1971) and consideration of "the relative benefit to be derived from . . . all . . . uses of the water concerned." Cal. Wat. Code § 1257 (West 1971).

These provisions of California law had no application in the case before the court since the SWRCB, in the D-1485 process, was not dealing with applications for the appropriation of water. All of the issues before the SWRCB, in D-1485, revolved around water right permits that had previously been granted by the SWRCB or its predecessor. There is no provision of law that would allow the reprioritization of water rights once they were granted and there was, until this case, no case law which would even suggest such a notion.[8]

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8 In addition to its misconstruction of the statutes discussed above, the court of appeal also relied upon *East Bay M.U. Dist. v. Dept. of Pub. Works*, 1 Cal. 2d 476 (1934) ("EBMUD case"). This case, however, does not support the court of appeal's assertions.

That case was a proceeding in *mandamus* to compel the State Water Commission, predecessor in function to the SWRCB, to strike from a permit that it had issued the condition that "the right to store and use water for power purposes under this permit shall not interfere with future appropriations of said water for agricultural or municipal purposes." That court was dealing with section 15 of the Water Commission Act (Stats. 1913 at 1012, as amended) which read as follows:

Footnote continued on following page.

The consequence of the court of appeal's decision is two-fold. First, as noted above, grave constitutional issues with respect to the taking of vested property rights are raised:

> "The State Water Commission shall allow, under the provisions of this act, the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. It is hereby declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. In acting upon applications to appropriate water, the commission shall be guided by the above declaration of policy. The commission shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest."

The policy declaration portion of this statute is now codified as Cal. Water Code § 106 (West 1971), and the portions of the statute relating to actions of the agency responsible for acting upon applications for the appropriation of water are now codified as Cal. Water Code §§ 1253-1255 (West 1971).

> "Cal. Water Code § 106. It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.
>
> "Cal. Water Code § 1253. The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.
>
> "Cal. Water Code § 1254. In acting upon applications to appropriate water the board shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water.
>
> "Cal. Water Code § 1255. The board shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest."

The issue before the court in the EBMUD case was whether the imposition of the condition was an improper exercise of a judicial function. The holding of the case is that in imposing the condition, the agency was exercising a delegated legislative function and was not exercising a judicial function. 1 Cal. 2d at 478. The decision does not stand for any general proposition that the SWRCB is authorized to impose a term modifying the priority of a water right permit either at the time of acting upon the application for that permit, or at any subsequent time. The case stands for the proposition that the SWRCB can reject an application based upon relevant and appropriate determinations in deference to the benefit derived from a competing application, but not that it can alter priorities.

> "Valid appropriative rights, for whatever purpose of use they may have been acquired, are vested property rights. Like other forms of private property, they may be taken for public use under the laws governing the exercise of the right of eminent domain. However, other than pursuant to express conditions properly imposed by the State Water Rights Board in the issuance of a license to appropriate water, . . . there is no legislative or judicial authority in California for the enforced advancing of the priority of an appropriation for one beneficial purpose over that of a prior appropriation for another beneficial purpose, either in time of water shortage or otherwise, without making due compensation."
> W. Hutchins, *supra* note 15, at 173-74.

Second, the question of reallocation, as dealt with by the court, injects uncertainty into the water allocation system and undermines the economic and social stability that has been created around and is dependent upon that system. The court never dealt with, and there is no indication that it ever considered, either of these concerns in making its revolutionary statement.

Thus far no other California court has adopted the suggestions offered in this case. In the court's defense, the issue itself was not briefed or argued by the parties in the manner that it was dealt with by the court and, as a consequence, it may be that the court was not aware of the ramifications of its loose language. In any event, since the language at issue is merely *dicta*, it can and should be ignored.

Having outlined the general problem above, it may perhaps be useful to now focus on the individual actions that you raised in your questions to me. As noted, there are any number of federal actions which, in fact, have a direct or indirect impact on the matters at issue here.

EPA – Bay-Delta Process

Whether or not EPA has jurisdiction to proceed with flow-related standards within the Bay-Delta (regardless of how it finesses the issue) is of some significance.

The ramifications of EPA's assertion of jurisdiction are not, however, limited to California and are beyond the scope of the current discussion. For the instant purposes, it is assumed, *arguendo*, that the jurisdiction exists. The significant and immediate concern focuses on how EPA exercises its purported authority, rather than on whether that authority exists.

EPA asserts that standards must be established that protect beneficial uses of Bay-Delta waters. In this regard, EPA focuses on biological resources, dealing with, among other things, species that fall under USFWS's/NMFS's ESA authority. In 1993-1994, EPA promulgated, in coordination with other Club Fed actions, draft regulations for the Bay-Delta. (Whether the proposed standards are scientifically supported is subject to some debate.) EPA has indicated that it will impose final standards for the Bay-Delta by the end of this year.

In response to EPA's action, the SWRCB initiated a series of workshops to evaluate possible standards that it might adopt. The idea is that if the SWRCB standards are close enough to the EPA's, then EPA would defer to the SWRCB regulations. How the SWRCB will, in fact, proceed is currently unknown. The significant point, however, is that EPA's actions have forced state reaction.

An additional reaction to EPA and general Club Fed activities is the so-called joint approach developed by the California Urban Water Association ("CUWA") and some agricultural water users. The approach attempts to meet EPA's position, while minimizing the water reallocation commitment. The idea is, assuming agreement, to endorse this approach as a solution to be adopted by the SWRCB and have EPA withdraw its proposed standards.

Several related and interrelated questions are presented. The joint approach assumes that the CVPIA-reallocated 800,000 acre feet will be fully credited to meet the Bay-Delta obligations and that NMFS/USFWS will not increase the current ESA requirements involved. How these issues are addressed by the federal agencies is significant and may make the difference between whether an agreed-upon solution is possible.

Regardless of what base assumption is used for the Bay-Delta standards, little of value has been done to analyze economic and social impacts that are certain to result from imposition of the standards. As will be discussed below, it appears that the real impacts of the EPA standards will be masked. EPA does not even purport to have authority to impose its standards. As a consequence, it is uncertain what assumptions are to be made with respect to how obligations to meet these standards have been analyzed and, by extension, how economic impacts have been or will be evaluated. How these implementation issues are addressed is crucial to whether and in what manner others will embrace the EPA's proposal and the joint approach. The standards advanced by EPA may, in the abstract, be defensible, but may, in implementation, be unacceptable.

The Programmatic Environmental Impact Statement

The Club Fed process integrates implementation of the CWA, ESA and CVPIA. Long-term implementation strategies are to be developed and analyzed in the PEIS. Thus, while in the short term interim contract negotiations are of interest, the long-term pattern of water contracting will be established by policy decisions that are integrated into the PEIS. As a consequence, the PEIS may be, over the long term, the single most significant document being developed by the federal government.

The PEIS, indeed, any environmental impact statement, must have within it a no-action alternative. The no-action alternative becomes the baseline upon which other alternatives are based. The closer the no-action alternative is to the proposed action, the less impact will be shown.

The no-action alternative currently being developed for the PEIS is flawed as a result of the USBR's Club Fed decision to base the no-action alternative on regulations other than those which existed at the date of enactment of the CVPIA, October 1992. This decision has lead USBR-Club Fed to improperly incorporate within the no-action alternative conditions that did not exist at the time the CVPIA was enacted. The USBR-Club Fed decision to include ESA, 1994-1995 operational

constraints, which incorporate, to a large degree, yet-to-be-adopted CWA standards providing Delta outflow requirements, in the no-action alternative is a prime example of the problem. By including such schemes as part of the baseline conditions, the USBR will present a distorted analysis of the impacts associated with implementation of the CVPIA.

Section 3409 of the CVPIA compels the USBR to prepare a PEIS which analyzes "the direct and indirect impacts and benefits" of implementing the statute, including "all fish, wildlife and habitat restoration actions and potential renewal of all existing Central Valley Project water contracts." Implicit in that directive is that the analysis will examine the effects *on present conditions* of implementing all parts of the CVPIA. An analysis of impacts which starts from a baseline condition other than what existed in October, 1992 will fall short of that objective and cannot possibly provide an accurate assessment of the impacts or benefits associated with implementation of the CVPIA in accordance with section 3409.

Club Fed

In many respects, the answer to the matters at issue may fall within how Club Fed operates. The interrelated Club Fed statutory authority creates a situation where the whole may be greater than its parts. It may be that EPA cannot impose its standards, but the USFWS/NMFS, through ESA regulation, and the USBR, through operational leverage, may, in fact, impose these standards *de facto* and in a manner that is destructive to basic California water rights.

The best way to illustrate this point is perhaps by example. EPA jurisdiction is constrained by CWA-related limitations. While there is currently some uncertainty in the law about exactly what those limits are, or what they should be, EPA has, in the instant situation, for the most part, attempted to couch its standards in terms of water quality/salinity. In other words, instead of providing that a certain outflow of water must pass a certain point, EPA has indicated that a certain salinity must be maintained at various locations. Regardless of what ultimate basis EPA rests its assertion of regulations upon, the social and economic impacts will be the same.

The Club Fed process has, of course, thrown various federal agencies together. As a consequence, we find that USFWS has adopted as part of its ESA requirements a water quality "mixing" related requirement for delta smelt, and that NMFS has adopted similar water quality standards as part of its winter run salmon ESA requirements even though they admit that these requirements are not, in fact, necessary for winter run. Thus, you have a situation where EPA's water quality requirements are adopted by USFWS/NMFS as ESA obligations, thus forcing EPA standards implementation through the ESA.

The USBR's role in this process is even more interesting and, over the long term, may be the most harmful. The USBR operates the largest water project in California. As noted earlier, this project is coordinated operationally through the COA, with the SWP. A decision by the USBR to meet, on a voluntary basis, the EPA-Club Fed standards will, of course, have an impact on the rest of the state. The sheer size of the CVP creates leverage on the state to accommodate its operation. Thus, a decision on the part of the USBR to voluntarily meet the Club Fed-EPA standards may have the practical impact of forcing the state to comply.

As noted earlier, the Club Fed-EPA position is one of "share the pain." Under this philosophy, it does not matter that one may have junior water rights or that those rights may be subject to area-of-origin laws. If the impact of Club Fed regulations falls "unfairly" upon one group, then, it is argued, they should be spread on some kind of equitable basis. As a consequence, one means to force the state to not only adopt the EPA-Club Fed standards is to voluntarily comply with those requirements, but to only meet a "fair" percentage of the obligation. This would arguably have the effect of making the state accept not only the standards but the sharing formula devised by the Club Fed process. As noted earlier, this was the assumption analyzed as part of the 1993-1994 Club Fed draft standards analysis.

Moreover, it is an assumption that, at times, has been used as part of the no-action alternative found in the PEIS.[9]

Club Fed and the USBR cannot suggest an allocation formula that directly contradicts California water law. The CVP was constructed based upon the commitment that only water surplus to the needs of areas of origin would be exported and that, in fact, sufficient water would be reserved to meet area-of-origin needs. See, e.g., the references set forth in Attachment "A." For the USBR/Club Fed to advocate a "spread equally" allocation formula flies in the face of the promises made by the United States government.

Moreover, it is improper for the USBR/Club Fed to engage in a second-guessing of the water rights process. There is no support for a USBR/Club Fed assertion that the State should or would ignore well-established California water law when it fashions its water rights decision. If any assumption must be made, it is that the SWRCB will reallocate water to meet increased Delta outflow obligations in a manner consistent with California's law of prior appropriation and with the area-of-origin statutes. It is the economic impact associated with this implementation strategy which must be assessed.

The Bay-Delta, Club Fed and CVPIA process outlined above is calculated to control the short- and long-term future of California water. The Club Fed process not only seeks to establish what relative regulations are to be set, but also how those regulations are to be implemented. Moreover, by combining the collective authority and operational control of EPA, USFWS-NMFS and the USBR, Club Fed can force the state to comply. A combination of authority and improper analysis will also mask the true economic impacts of what is proposed.

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9 In some respects it is not clear what implementation strategy will be utilized within the PEIS. Until recently, the share-the-pain strategy was used as the means of implementation within the PEIS. Currently there appears to be no implementation discussion within the PEIS's no-action alternative, with implementation perhaps being added at some later date to an appendix.

There is no question that Club Fed has been very successful in forcing its views. The so-called CUWA-Ag joint approach is one example of how the process has forced water interests to embrace the federal view out of fear that it will otherwise be forced upon them. Unless some action is taken to force the Club Fed process to responsibly evaluate the impacts of its proposal, they will be adopted and implemented without any real consideration of the magnitude of the impacts of doing so.

In reviewing this matter, I have arrived at certain corrective measures which, I believe, must be undertaken in order to insure that the Bay-Delta, Club Fed and CVPIA actions are undertaken in a responsible manner. I have outlined these measures below:

1. The Least Harmful Economic Alternative Must Be Selected

There is a perception, real or perceived, that federal regulatory efforts are undertaken in a manner that attempts to punish agriculture. In many respects this derives from the nature of the discourse which involves third party environmental groups who clearly adhere to a "punish agriculture" philosophy. The fact that some within relevant regulatory agencies are from the environmental community, of course, fuels the perception. Moreover, the sheer quantity of water that will be reallocated from consumptive use to environmental purposes appears to justify a view that regulations and standards are being imposed in a manner that is not geared toward minimizing disruptive economic impacts.

The law does not, in any way, require that the most economically harmful alternative be chosen. Indeed, such a construction of the law would be ludicrous. The fact of the matter is that all of the relevant statutes which control in this matter require reasonable agency action which would preclude the adoption of an economically harmful alternative. Moreover, the CVPIA requires the selection of the least economically harmful alternative.

2. Regulations and Statutes Must Be Reasonable and Balanced

Choosing the least harmful economic alternative also addresses, to a degree, the requirement that any regulatory standard must be reasonable and balanced. While this may also seem obvious, the fact remains that regulatory agencies assert that they have little room to balance and that ESA limitations or EPA CWA standards must be established without regard to the ultimate impact of regulations or standards. Thus, the federal agencies seek refuge behind what they argue are inflexible statutory provisions, and in so doing attempt to divert attention from the means by which they attempt to implement the statutory provisions.

As noted above, the idea that the law would compel one to choose the most economically harmful alternative is a ludicrous assertion. In a similar measure, it is also ludicrous to assert that the law is so inflexible as to make the establishment of regulations and standards focused only on the resources to be protected without consideration of the impact that those regulations and standards would have on jobs, the economy or even the environment of the Sacramento Valley. In fact, none of the relevant statutory provisions compel such a result. See, e.g., Section 7 of the ESA which requires an analysis of "reasonable and prudent alternatives." All require the agencies to act in implementation in a reasonable fashion balancing all of the relevant interests that are involved.

Club Fed will, of course, argue that they are acting in a reasonable fashion. However, as is noted below, unless they have undertaken a real analysis of the impacts of their proposed regulations and standards, this cannot be the case. They did not do this as part of their original effort, and if the USBR's past actions with respect to its PEIS no-action alternative is a guide to where they intend to go in the future, no real economic analysis or balancing is contemplated.

Moreover, the Club Fed current focus is limited to the establishment of regulations and standards in the Bay-Delta. As a consequence, impacts are evaluated without regard to other regulatory constraints that may exist in the system. For example, evaluation of contributions to Delta outflow ignores what obligations

upstream entities may have to instream flows and habitat issues above the Delta. There are, for example, CWA obligations to protect "beneficial uses" of waters upstream from the Delta which are no less important than the mandate to protect the beneficial uses of Delta waters. There are also significant ESA-related issues in upstream areas that must be addressed.

For the most part, these upstream obligations can only be met by entities who divert and use water upstream from the Delta. Imposition of Delta obligations on these entities without consideration of limitations already imposed and to be imposed on these entities masks the total impacts of federal actions. Moreover, failing to recognize the limits that reasonably can be imposed on upstream interests also underestimates the burden that will be borne by those that export from the Delta.

In one sense the Club Fed agencies understand this. The USFWS has asserted that the Bay-Delta standards will be implemented with CVPIA fish doubling goals in mind. However, the USFWS notes that, to the extent that the goals are not met through Bay-Delta standards implementation, they will be met upstream.

In spite of this obvious interrelationship, to date no broader analysis of impacts associated with this type of regulatory intent has been undertaken. The federal agencies must adopt and analyze a broader view of proposed actions in order to insure that the total impacts of their actions are evaluated.

3. The Concept of "Share the Pain" Must Be Rejected

The "share-the-pain" concept articulated by Club Fed is one that assumes that Club Fed regulatory actions, i.e., actions taken pursuant to the ESA, CWA and the CVPIA, will cause a change in Delta water facilities operations or a reallocation of water which will create a degree of adverse impact (both direct and indirect) to those who otherwise are dependent upon the water and operations affected by the Club Fed decisions. Based upon this assumption, Club Fed argues that it would be inequitable for the entire adverse impact of the regulations to fall on any one group

of users, for example, water exporters below the Delta who, because of their reliance on junior water rights, would and, in fact, have born the brunt of regulatory reductions of water supply.

Instead, Club Fed suggests that the fair way to proceed is to allocate the obligations at issue equitably among all water users. Thus, the total impact of the regulations will not be borne by junior appropriators but, rather, it will be spread among a broader universe of water users. The prospect, from an upstream senior water right holder's perspective, is a reduction of supply regardless of the relative priority of water rights and regardless of the relationship of the diversions in question to the problem being addressed in the Delta.

The proposal ignores California water law and the relative priorities and property rights established under that body of law. Any allocation of obligations not linked directly to specific actions by water users must be allocated by priority, not on a proportionate basis. An allocation that ignores relative priority ignores the property rights of those who hold senior water rights. Proceeding in this manner also undercuts the water rights system itself and the certainty that that system was created to insure. Uncertainty not only affects those agricultural and urban interests with prior water rights that rely upon certainty in those water rights, but also undercuts the ability to reallocate water through water transfers.

Assuming a priority to water and that the fundamental issue being addressed is a Delta outflow related requirement, the "cause" of more limited outflow is the diversion of water above that which should be diverted at any given time. In other words, junior appropriators may be diverting water when no water is, in fact, available for appropriation under their junior right. The solution is not, as Club Fed would have one accept, to ignore the priorities involved; instead, it should be to invoke the priority system to address the problem. In this regard, it may be that the impact of the standards and regulations on junior right holders is simply too great. In this situation, the answer is not to arbitrarily allocate the obligation elsewhere, but rather to modify the regulation so it is imposed in a reasonable and balanced fashion.

Asserting that the "share-the-pain" concept advanced by Club Fed is not an appropriate way to proceed does not mean that there is no Delta outflow obligation that must be met by upstream senior right holders. The proper allocation of responsibility, however, must be through an application of the water rights priority system with senior right holders having to curtail their diversions only after junior water right holders' diversions have been curtailed. There may, in fact, under this scenario, be a number of years where upstream diverters will have to forego diversions or make releases from storage in order to meet Delta outflow obligations. The impacts of this means of proceeding, of course, will need to be evaluated against the reasonableness standard.

I recognize that in practice allocation of a Bay-Delta obligation by priority may be difficult. This is because the administration of the water rights system in California may not be fine-tuned enough to distribute obligations to all water right holders based upon pure priority.

The priorities that can be dealt with readily are those rights granted since 1914 for which a license or permit exists. There is little question that these rights can and should be affected first by the Delta obligation in inverse order of priority. After all, a determination that more water is needed for Delta outflow is just another way of determining that not as much water is available for appropriation and diversion as was thought when these junior water rights were granted.

Assuming that these junior right holders have refrained from the diversion of the natural flow, and additional water is still needed to meet the Delta obligation, then pre-1914 water right holders' right to divert natural flows may be affected. The problem is, however, that determining the relative priorities of the pre-1914 water rights may be difficult, if not impossible, without a system-wide adjudication. As a consequence, it may be necessary to allocate to all pre-1914 water right holders, as a class, an obligation to meet the outflow requirements that may be left. The attractiveness of proceeding in this way is

further enhanced when one recognizes that to meet a Delta outflow obligation one must seek contributions from every stream tributary to the Delta. This process, as applied to pre-1914 water right holders, would undoubtedly take more time, money and effort than can be justified. Proceeding as recommended here would anchor the process in the water rights system while still allowing for some means of practical administration.

The net result of proceeding to allocate Delta obligations based upon water rights priorities is that junior appropriators will bear the most significant burden. This fact alone is not a justification to ignore property rights in water. In this regard, I am mindful that the CVP and SWP may have to meet most of the obligation. This is the result, however, of the relative junior status of the water rights that exist for those projects and their sheer size, as opposed to any defect in the water rights system. Indeed, the system recognized that this would be the result in times of shortage and both the CVP and SWP proceeded with this knowledge. The fact that the shortage is caused by regulatory actions as opposed to drought makes no difference.

I have heard this result called "unfair." In fact, the result may not be "fair." However, this does not even come close to a legitimate rationale for ignoring the property rights based system of water law which exists in this state. This does not mean, however, that we should ignore or be insensitive to the burdens that may be imposed on CVP/SWP export contractors. We must be concerned about these water users.

As noted elsewhere, in response to the coercive effect of the Club Fed process, many of these entities have developed an approach that would address the Club Fed mandate in a more rational fashion. In my view, we should endorse this approach with two qualifications.

First, it, as well as the Club Fed proposal, should be scrutinized pursuant to a proper economic analysis. This analysis may lead to an adjustment of the

proposal to account for a reasonable balance of interests. The acceptance and application of standards without a proper balancing is simply unacceptable.

Second, the economic analysis must contemplate implementation through the property-based prior rights system of California water law. Thus, the disproportionate economic impacts discussed above must be recognized, evaluated and balanced as part of the standard-setting process.

The prior rights system of law should be viewed in a way that can assist in addressing the potential burdens of implementation. Water rights are property rights.

In explaining property rights in water, Professor Frank Trelease, back in 1974, offered an analogy to another resources with which we are all quite familiar and which, like water, must be wisely protected, sometimes preserved from use, and which must be shifted from old uses to new and more desirable uses as times and needs change. Professor Trelease stated that in understanding the idea of property rights in water, we should "think land."

> "Land is just as valuable and indispensable a resource as water. Our lives and our wealth depend upon it. The government, the ultimate source of title, wishes to see that the resource is put to its highest and best use. . . . [I]t could have distributed land through a "land bureaucrat" [who would] . . . allow its temporary use for particular regulated purposes at will or for a term of years, but when a new or better use is seen, reallocate it by moving off the present tenant and installing a new one. [But that is not what is done.] Instead, the government allocates the land in discrete and identifiable parcels, as private property. The land laws make these property rights very firm and secure. Land is then available for use by individuals to produce wealth. Since each person will try to make the best use of it that he can, the total of individual wealth will approach the production of maximum national wealth. Yet new and more productive uses by a different person may come to be seen desirable. Since the land is a valuable asset, if it were to be transferred to another person without compensation, the first holder would be impoverished and the later enriched. Therefore,

> the laws provide that the property rights are not only secure but are also voluntarily transferable. The land can be bought by the new user for the new purpose by paying the owner a price. In most cases the government is willing to let the change occur because it knows the new use is better than the old, since otherwise the buyer could not afford to pay the seller the capitalized value of the seller's use plus a profit. If private land uses and transfers are likely to have harmful effects on others, however, zoning law, land use planning laws and other regulatory devices may be used to prevent the harm. If the government comes to need the land for a public purpose that outweighs its value for private purposes, it has power to condemn it. In this fashion, social plans for schools, roads, parks, green belts and housing projects are implemented. If such needs are known before the government has disposed of the land, it may reserve it and prevent the acquisition of private rights: no homesteads in Yellowstone Park." Trelease, *"The Model Water Code, the Wise Administrator and the Goddam Bureaucrat"*, 14 Nat. Resources J. 207 (1974).

The solution to the disproportionate burden that might have to be borne by junior water right holders is not to do away with the law of prior appropriation but to strengthen it. Recognizing existing property rights in water allows one to fully rely upon a basic and essential attribute of any property right which is alienability -- the right to transfer that right to others. Thus, a recognition of the prior rights system should allow the shift of water toward junior appropriators so that adverse impacts to those entities and individuals can be avoided. Free market transfer can be facilitated by the federal government. However, free market in water rights can only be advanced if the federal government first adheres to the system of California water rights which recognizes relative priorities.

One final point should be made with respect to the application of the prior rights system of law. To this point I have focused exclusively on the protection of exercised water rights. However, as noted earlier, certain promises, in the nature of priority guarantees, were made to areas of origin, upstream of the Delta. The burdens associated with the Club Fed – ESA – CWA obligations should not be borne by these entities. Indeed, it is simply unconscionable for the federal agencies to attempt to spread the Delta obligation to areas upstream of the

Delta. The CVP was developed based upon the concept that only water surplus to the needs of these areas would be developed and exported as Project water. Since the CVP cannot, at all, justify its failure to fully contract with entities within the areas of origin, such as those on the Tehama-Colusa Canal, it certainly cannot insist on these same areas contributing to the Delta obligation. Transfer proposals must also honor these area-of-origin rights. Providing areas of origin with a right of first refusal to a percentage of water available for transfer, for example, may be one means of protecting areas of origin while also addressing the question of third party impacts.

4. True Economic Impact Analysis Is Essential

In the past, the actual economic impacts of proposed Club Fed actions have been masked through utilization of the share-the-pain concept, as well as through an approach that hides individual agency actions and impacts with other actions and impacts. As a consequence, for example, the impacts of the CVPIA are masked by its incorporation of ESA and CWA regulations and standards. The impacts of the ESA are masked by asserting that they would be imposed by the CWA, in any event, and the CWA standards are masked by an assertion that, for the most part, they are only an adoption of ESA limits. The net result of this endless circular game is that one never is able to properly evaluate either incrementally or cumulatively the true impacts of federal actions.

This past practice is likely to be repeated. As noted, this is the exact approach that, until recently, had been adopted as part of the PEIS's no-action alternative. This approach must be rejected. The public is entitled to know the full impact of the proposed regulations and standards, including the consequences of each action, as well as the cumulative impact of all of these actions together.

5. The PEIS No-Action Alternative Must Reflect an October, 1992 Baseline Condition

The no-action alternative is an essential component of the PEIS. It is the foundation upon which the entire impact analysis rests. Moreover, as noted

elsewhere, it will have ramifications far broader than just the operation of the CVP. As a consequence, the no-action alternative must reflect an October, 1992 baseline condition and must also adhere to California water rights law, including water rights priorities and area-of-origin laws.

While valid arguments exist that the root cause of the problems described above can be found in the various statutory provisions noted above, those arguments go beyond what is of immediate importance. On a very fundamental level, the problem is rooted in how the statutes at issue are being implemented and, as a consequence, proposed solutions focus on modifications in implementation. Modification of implementation policies should be developed along the following lines.

- Implementation of regulatory provisions associated with the CWA, ESA and CVPIA must be undertaken in a manner that minimizes the loss of jobs and minimizes adverse impacts to the economy.

- Implementation of regulatory provisions associated with the CWA, ESA and CVPIA must be undertaken in a reasonable and balanced fashion. Prior to imposing regulations in the Bay-Delta, there must be analysis of environmental obligations in upstream areas. In this way, the total impact of regulations can be evaluated.

- "Share the pain" cannot be an Administration policy. Rather, the means by which regulations are imposed should be a matter of state law. Property rights, including water rights priorities and area-of-origin protections, must be honored and adhered to. The impact of regulations on any group of water users must be part of the analysis undertaken in developing federal regulations and standards. These regulations and standards may need to be modified if they have an unreasonable impact on any group of water users. Water transfers, facilitated by federal agencies, may be one means by which regulatory impacts can be minimized.

- Economic analysis of regulations and standards must be undertaken in a way that discloses, rather than masks, economic impacts. The consequence of each action must be evaluated as must the cumulative impacts of all proposed actions together.

- The CVPIA's PEIS's no-action alternative must use as a basis the operation of the CVP in October, 1992. All proposed alternatives should be evaluated against this baseline.

I am certain that the foregoing will be the subject of a great deal of discussion and that some of the views expressed may need further refinement. Nonetheless, I believe that it provides the means through which meaningful dialogue on these issues can be initiated. Please do not hesitate to contact me if you have any questions or need additional information.

Very truly yours,

Stuart L. Somach
Attorney

SLS:sb

cc: Board of Directors

Encl.

THE SECRETARY OF THE INTERIOR

WASHINGTON

NOV 3 1994

Honorable Richard H. Lehman
House of Representatives
Washington, D.C. 20515

Dear Mr. Lehman:

Thank you for your letter of May 24, 1994, cosigned by Representatives Calvin Dooley and Gary A. Condit, regarding implementation of the Central Valley Project Improvement Act (CVPIA).

As discussed in your letter, the dedication of 800,000 acre-feet of Central Valley Project yield for fish and wildlife raises many issues regarding other purposes of the Act, including meeting the Bay/Delta water quality needs; satisfying requirements of the Endangered Species Act for winter-run chinook salmon and delta smelt; and delivery of water for agricultural uses. The primary use of the 800,000 acre-feet will be to double the anadromous fishery in Central Valley streams. Meeting these purposes is a significant challenge and one we do not take lightly. The Fish and Wildlife Service and Bureau of Reclamation have been involved in extensive coordination to establish an approach to meet these purposes to which both agencies are committed.

I recognize that this very significant Act can provide fertile ground for debate on meaning and intent. However, I believe we can all agree that the significant questions do not necessarily rest with exact calculations in acre-feet, but with achieving the primary purposes of the CVPIA. Please be assured that the Department of the Interior is committed to achieving the goals of the Act in an expeditious manner. I anticipate having guidelines on use of water and implementation of other priority actions in the near future. Your input and support is critical to all of us in this endeavor.

I am committed to establishing the foundation for decades to come that will result in productive fish and wildlife resources living in harmony with agricultural and urban interests in California.

If I can be of further assistance, please do not hesitate to call.

Sincerely,

Bruce Babbitt

A HISTORY OF WATERSHED PROTECTION

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WATERSHED PROTECTION: FEDERAL ACTIVITIES AND LAWS

SELECTED EVIDENCE OF FEDERAL INTENT THAT THE CENTRAL VALLEY PROJECT BE SUBJECT TO STATE LAW

1. "The Act of March 3, 1891...leave(s) the disposition of the water to the state." -

> "The 1891 Act relegated the matter of appropriation and control of all natural sources of water supply in the State of California to the authority of that state. The Act of March 3, 1891, deals only with the right-of-way over the public lands to be used for the purposes of irrigation, leaving the disposition of the water to the state." H.H. Sinclair, 18 ID 573, 574 (1894).

2. "The United States does not control the water. It controls only the reservoir sites..."

> The United States does not control the water. It controls only the reservoir sites in which the water may be collected. The water is under the control of the states." 29 Cong. Rec. 1948-1949 (1897) (Cong. Lacey).

3. "The distribution of the water...should be left to the settlers..."

> "The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with state laws and without interference with those laws or with vested rights." Theodore Roosevelt, HR Doc. No. 1, 57th. Cong., 1st. Sess., XXVIII (1901).

"Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state..."

> "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the secretary of the interior, in carrying out the provisions of this act, shall proceed in

conformity with such laws, and nothing herein shall in any way affect any right of any state or of the federal government or of any land owner, appropriator, or user of water, to, or from an interstate stream or the waters thereof: Provided that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." Reclamation Act of 1902 (43 USCS §§ 371m 383.)

4. "...even an appropriation of water can not be made except under state law."

"The bill (the Reclamation Act of 1902) provides explicitly that even an appropriation of water can not be made except under state law." 35 Cong. Rec. 6687 (1902) (Cong. Mondell).

5. "If the appropriation and use were not under the provisions of the state law the utmost confusion would prevail."

"If the appropriation and use were not under the provisions of the state law the utmost confusion would prevail." 35 Cong. Rec. 6770 (1902) (Cong. Sutherland).

6. "...the authority of each state in the disposal of the water...was unquestioned and supreme..."

"It has heretofore been assumed that the authority of each state in the disposal of the water supply within its borders was unquestioned and supreme,..." E. Mead, Irrigation Institutions 372 (1903). -

"...the Bureau of Reclamation fully recognizes and respects existing water rights..."

"...the Bureau...has complied with California's 'County of Origin' legislation...only surplus water will be exported elsewhere."

"In conducting irrigation investigations and constructing and operating projects throughout the west, the Bureau of Reclamation fully recognizes and respects existing water rights established under state law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure. This basin report on the Central Valley is predicated on such a policy." "Comprehensive Departmental Report on the Development of the Water and Related Resources of the Central Valley Basin" (August, 1949, Sen. Doc. 113, 81st Con., 1st Sess.)

The report went on to state:

"In addition to respecting all existing water rights, the Bureau of this report has complied with California's 'County of Origin' legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus water will be exported elsewhere." "Comprehensive Department Report on the Development of the Water and Related Resources of the Central Valley Basin" (August, 1949, Sen. Doc. 113, 81st Con., 1st Sess.)

7. "Since it is clear that the states have control of water within their boundaries...the California Constitution...protects the vested rights of...owners for present and prospective beneficial uses to which the lands are or may be adaptable..."

"Since it is clear that the states have control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the state, if there is to be proper administration of the water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st. Sess., 3, 6 (1951).

"Sections 11460, 11463 and 10505 are in keeping with the provisions and the policy of (the California Constitution) which permits and requires reasonable and beneficial use, and which protects the vested rights of the riparian and overlying owners for present and prospective beneficial uses

to which the lands are or may be adaptable; and they extend by statute the protection given to riparian and overlying owners by the (California Constitution) to all inhabitants and property owners of the County in water which may be necessary for the development of the County and which protection they only incidentally and indirectly received prior to (the adoption of Article X, § 2 of the California Constitution)." Rank v. Krug (1956) 142 F. Supp. 1, 150.

8. "...the Attorney General handed down an opinion which held...that the provisions of Sections 11460 and 11463 are imposed upon any agency of the State of California or United States..."

"In Opinion 53/298 filed January 6, 1955 (25 Ops. Cal. Atty. Gen. 8), the Attorney General (Pat Brown) handed down an opinion which held among other things, that the provisions of Sections 11460 and 11463 are imposed upon any agency of the State of California or United States by virtue of the statute, regardless of their inclusion or omission in any permit issues by the State Engineer. In that conclusion, the Court agrees." Rank v. Krug (1956) 142 F. Supp. 1, 150.

9. "The assignments by the Department of Finance to the United States were thus ineffectual to transfer anything except the right to pursue the applications to permit, under the terms and conditions of the California Water Code."

"The assignments by the Department of Finance to the United States were thus ineffectual to transfer anything except the right to pursue the applications to permit, under the terms and conditions of the California Water Code." Rank v. Krug (1956) 142 F. Supp. 1, 153.

10. "Project plans must comply with state legal provisions or priorities for beneficial use of water."

> "State and federal law and policy established the framework for project formulation. Project plans must comply with state legal provisions or priorities for beneficial use of water." United States Department of Interior, Bureau of Reclamation, Reclamation Instructions Section 116.3.1 (1959).

WATERSHED PROTECTION:
STATE OF CALIFORNIA ACTIVITIES AND LAWS

SELECTED EVIDENCE OF STATE INTENT TO PROTECT COUNTIES/WATERSHEDS OF ORIGIN

1. "...diversion of surplus waters from the Sacramento River into the San Joaquin Valley... gives full protection against present or future loss..."

   "In fact, the whole discussion of the diversion of surplus waters from the Sacramento River into the San Joaquin Valley, must be predicated from the institution of a coordinated development in both valleys that gives full protection against present or future loss to the owners of vested rights into present users of water as well as to those potential users whose lands lie tributary to streams from which exportations of water are proposed." Bull. No. 9, Div. of Engineering and Irrigation, Dept. of Public Works (1925) p. 18.

2. "...new supplies...would be taken from areas of surplus after providing for their completed development."

   "The new supplies for the deficient areas would be taken from areas of surplus after providing for their complete development." Bull. No. 12, Div. of Engineering and Irrigation, Dept. of Public Works (1925) p. 48.

3. "...no water should be diverted from the area of origin which is now or may ever be required for any beneficial use..."

   "In supplying areas of deficiency of water from areas of surplus, only such water as is not needed to serve vested or other property rights, or necessary for supplying the uses and purposes hereinbefore mentioned should be considered and no water should be diverted from the area or origin which is now or may ever be required for any beneficial use within such area of origin." Report of Joint Legislative Committee Dealing With the Water Problems of the State, January 18, 1929, p. 19.

4. "It shall be the policy of the state to extend to the areas of surplus water...definite and valid assurance that such areas...shall have a right to ample water for their ultimate needs..."

> "It shall be the policy of the state to extend to the areas of surplus water, from which, under the coordination policy or development thereof, areas of deficient water may obtain a supply, definite and valid assurance that such areas of surplus from which water is or may be taken shall have a right to ample water for their ultimate needs, superior and prior to that of the areas of deficiency to make use of such surplus." Supp. Report of Joint Legislative Committee Dealing With the Water Problems of the State, April 9, 1929, p. 5.

5. "...basins favored with water in excess of their needs would be furnished a regulated supply in accordance with the requirements of their ultimate development."

> "Under this plan, the basins favored with water in excess of their needs would be furnished a regulated supply in accordance with the requirements of their ultimate development. Waters in excess of their needs would be conveyed to areas of deficiency..." Bull. No. 25, Div. of Water Resources, Dept. of Public Works, January 1, 1931, p. 35.

6. "No priority under this part...shall...deprive the county in which the appropriated water originate of any such water necessary for the development of the county."

> "No priority under this part (Part 2, Appropriation of Water by Dept. of Finance) shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originate of any such water necessary for the development of the county." Water Code § 10505 (stats. 1931, Ch. 720, p. 1514.)

7. "...a watershed or area wherein water originates ...shall not be deprived...of the water reasonably required to adequately supply the beneficial needs of the watershed..."

> "In the construction and operation by any authority of any project under the provisions of this part (Part 3, Central Valley Project), a watershed or area which water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein." Water Code § 11460 (stats. 1933, Ch. 1042, p. 2650, § 11.)

8. "Section 11460 has the effect of reserving to the entire body of inhabitants and property owners in watersheds of origin a priority..."

> "Section 11460 has the effect of reserving to the entire body of inhabitants and property owners in watersheds of origin a priority as against the water project authority in establishing their own water rights in the usual manner as their needs increase from time-to-time up to the maximum of either their ultimate needs or the yield of the particular watershed." 25 Ops. Cal. Atty. Gen. 8, 20 (1955).

9. "The priority...of watersheds...may not in any way be defeated..."

> "The priority thus reserved to inhabitants of watersheds of origin by section 11460 may not in any way be defeated by any action or proceeding by the authority." 25 Ops. Cal. Atty. Gen. 8, 22 (1955).

10. "...it should be noted that the statute imposes the limitations in any event..."

> "Therefore as to either state or federal agencies engaged in construction and operation of the Central Valley Project, the state engineer may incorporate into his permit as conditions thereof the limitations on the powers of assignees established by sections 11460 and 11463. However, it should be noted that the statute imposes the limitations in any event, regardless of their inclusion or omission from the permit." 25 Ops. Cal. Atty. Gen. 8, 32 (1955).